

DEPARTMENT OF INSURANCE**July 1, 2005****Bulletin 132****CREDENTIALING OF HEALTH CARE PROVIDERS
BY INSURERS AND HEALTH MAINTENANCE ORGANIZATIONS**

This Bulletin is directed to all insurers and health maintenance organizations (HMO) doing business in the state of Indiana. "Credentialing" is defined at IC 27-8-11-1(b) as a process through which an insurer makes a determination, based upon criteria established by the insurer or HMO, concerning whether a provider is eligible to provide health care services to an insured or enrollee, and receive reimbursement for those services, under a contract entered into between the provider and the insurer or HMO. Currently, not all insurers and HMOs use the same credentialing application form. The General Assembly reviewed the issue and determined that it would improve the system of credentialing if all insurers and HMOs used a standard application form. Senate Enrolled Act 43 (Pub. Law 26, 2005) directs the Department of Insurance to prescribe the application form developed by the Council for Affordable Quality Healthcare as a standardized form for credentialing.

Therefore, pursuant to Senate Enrolled Act 43 (Pub. Law 26-2005), the Department of Insurance hereby prescribes the credentialing application form used by the Council for Affordable Quality Healthcare to be used by all insurers and HMOs doing business in the state of Indiana. The application may be used in either an electronic or paper format. Insurers and HMOs may choose to have the CAQH provide credentialing services or they can perform the function themselves. The CAQH form is available on the Department of Insurance website, www.state.in.gov/doi.

INDIANA DEPARTMENT OF INSURANCE

James Atterholt, Commissioner

DEPARTMENT OF STATE REVENUE**COMMISSIONER'S DIRECTIVE #29****August 2005**

DISCLAIMER: Commissioner's Directives are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information that is not consistent with the law, regulations or court decisions is not binding on either the Department or the taxpayer. Therefore the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Prohibition of Multiple Tax Credits for Same Investment**REFERENCES:** IC 6-3.1-1-3; IC 6-3.1-10; IC 6-3.1-11; IC 6-3.1-11.5; IC 6-3.1-11.6; IC 6-3.1-13.5; IC 6-3.1-19; IC 6-3.1-24; IC 6-3.1-26**I. INTRODUCTION**

The purpose of this Directive is to explain IC 6-3.1-1-3 (effective retroactive to January 1, 2005) which limits the number of tax credits that a taxpayer can qualify for if the investment that is made by the taxpayer could qualify for multiple credits.

II. TAX CREDITS INCLUDED IN THE LIMITATION

If a taxpayer qualifies for more than one of the following credits, the taxpayer is only allowed to claim one of the credits for the same project.

- (1) Enterprise zone investment cost credit (IC 6-3.1-10)
- (2) Industrial recovery tax credit (IC 6-3.1-11)
- (3) Military base recovery tax credit (IC 6-3.1-11.5)
- (4) Military base investment cost credit (IC 6-3.1-11.6)
- (5) Capital investment tax credit (IC 6-3.1-13.5)
- (6) Community revitalization enhancement district tax credit (IC 6-3.1-19)
- (7) Venture capital investment tax credit (IC 6-3.1-24)
- (8) Hoosier business investment tax credit (IC 6-3.1-26)

III. ELECTION OF TAXPAYER TO CHOOSE CREDIT

If a taxpayer, pass through entity, or shareholder, partner, or member of a pass through entity has been granted more than one tax credit for the same project, the taxpayer, pass through entity, or shareholder, partner, or member of a pass through entity must elect to apply only one of the tax credits.

When the taxpayer chooses the credit that will be used for the investment made in the project, the taxpayer is not permitted to change the credit selected in subsequent years.

If the taxpayer uses all of the credits that the taxpayer has been awarded, the taxpayer is not allowed to elect a subsequent credit for the same investment in the following years.

John Eckart

Commissioner

DEPARTMENT OF STATE REVENUE**IN REGARDS TO THE MATTER OF:****TOM ARNBO****5083 STONESPRING WAY****ANDERSON, IN 46012****DOCKET NO. 29-2004-0338-A****FINDINGS OF FACT, CONCLUSIONS OF
LAW AND PROPOSED DEPARTMENTAL ORDER**

An administrative hearing was held on Monday, January 31, 2005 and Tuesday, February 1, 2005 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Tom Arnbo, was represented by Marilyn A. Moores and Arend J. Abel of Cohen & Mallad, LLP, One Indiana Square, Suite 1400, Indianapolis, Indiana 46204. Attorney Doug Klitzke appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-21.5 et seq., evidence was submitted, and testimony given. The Department maintains a record of the proceedings. The transcript of the hearing was received by the Administrative Law Judge on February 24, 2005. A Supplemental Brief from the Department was received on March 18, 2005. A Supplemental Brief on behalf of the Petitioner was received on April 2, 2005. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Proposed Departmental Order.

REASON FOR HEARING

An investigation was conducted by the Criminal Investigation Division of the Indiana Department of Revenue and was completed on June 15, 2004. The Department issued a letter to Petitioner dated September 3, 2004, which stated, "[T]here has been a failure by the licensed operators, Tom & Sally Arnbo, to properly carry out their responsibilities of supervising the charity gaming operations of Anderson Hoop Shooters, Inc....Tom & Sally Arnbo will not be considered as "operators" on any charity gaming application either now or in the future." The Petitioner protested the Department's decision in a timely manner.

FINDINGS OF FACTS

- 1) The Criminal Investigation Division of the Indiana Department of Revenue (hereinafter referred to as Department) conducted an investigation of Anderson Hoop Shooters, Inc. and Petitioner in 2002. (Record at 113).
- 2) Anderson Hoop Shooters, Inc. (hereinafter referred to as Anderson) runs Slam Dunk Bingo. (Record at 31).
- 3) Slam Dunk Bingo was located at 121 Federal Drive, Chesterfield, Indiana 46017. (Department's Exhibit #1).
- 4) Petitioner did not testify during his administrative hearing.
- 5) Petitioner was listed as an operator for Anderson during the periods at issue. (Department's Exhibits #2, 3, and 4).
- 6) An operator is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law. (See IC 4-32-6-17).
- 7) Anderson's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the periods September 1, 2000 to August 31, 2001 and September 1, 2001 to August 31, 2002 list its principal office address as 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibits #6 and 8).
- 8) Anderson's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2002 to August 31, 2003 list its principal office address as 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #11).
- 9) Anderson's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the periods September 1, 2000 to August 31, 2001 and September 1, 2001 to August 31, 2002 lists as its address where the charity gaming financial records are maintained as 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibits #6 and 8).
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- 12) Anderson's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2001 to August 31, 2002 lists Petitioner as the name of the person maintaining their financial records. It also states that his address is 5083 Stonespring Way, Anderson, Indiana 46012. (Department's Exhibits #8).
- 13) Anderson's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2002 to August 31, 2003 lists Philip D. Foley (hereinafter referred to as Dr. Foley) as the name of the person maintaining their financial records. It also states that his address is 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #11).
- 14) The Department alleges that Anderson failed to report \$3,592,499 in gross revenue from the sale of pull tabs for the periods ending August 31st of 2001, 2002, and 2003. (Record at 147).

- 15) Dr. Foley signed Anderson's CG-2Rs (Annual Bingo Renewal Application) for the years 2001, 2002, and 2003. (Department's Exhibits #2, 3, and 4).
- 16) Dr. Foley signed Anderson's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the accounting periods September 1, 2000 to August 31, 2001; September 1, 2001 to August 31, 2002; and September 1, 2002 to August 31, 2003. (Department's Exhibits #6, 8, and 11).
- 17) Sally Arnbo's signature appears on Anderson's CG-INV (Charity Gaming Ending Inventory Statement) for the period September 1, 2001 to August 31, 2002. (Department's Exhibits #8).
- 18) Sally Arnbo's signature appears on Anderson's CG-INV (Charity Gaming Ending Inventory Statement) for the period September 1, 2002 to August 31, 2003. (Department's Exhibits #11).
- 19) The Petitioner's signature only appears on Anderson's CG-DIST, (Indiana Department of Revenue Charitable Contribution Distribution Listing) as the preparer of the schedule, for the period September 1, 2002 to August 31, 2003. (Department's Exhibit #11).
- 20) During cross examination Sally Arnbo was asked,
- "Q And the bingo applications and the reapplications that we had introduced into evidence earlier, did you fill those applications out?
- A Pretty much, yes. In total, yes, pretty much, but not total.
- Q What part didn't you fill out?
- A Well, I didn't fill the distribution, the part that Dr. Foley gave to Tom. Other than that, I pretty much filled the rest of it out." (Record at 278).
- 21) Anderson's building was prone to water damage especially where the charity gaming supplies were kept as evidenced by Petitioner's Exhibits BB through KK.
- 22) Sally Arnbo, when asked, "how bad would you say the water problem was before the landlord made the repairs?" stated, "The water problem was terrible and we complained to him many, many times about it, showed it to him, you know, and said, you know, you've got water, you know, there were times when literally we could see it running and we put garbage cans up when it was dripping out of the ceiling, so it was bad. It was bad. Sometimes worse than other times. (Record at 241).
- 23) As many as two thousand (2,000) boxes of pull tabs were discarded in the trash. (Record at 239).
- 24) No inventory of discarded pull tabs was ever undertaken. (Record at 301).
- 25) The Department asked Sally Arnbo, "During the time that you had the losses from the spoiled pull tabs, did you ever consider asking the Department, 'How should I account for these?'" Ms. Arnbo responded, "No sir, I didn't. I asked the distributors, 'Would you take this back' and, or course, they wouldn't and I didn't know what else to do with them and I never thought about asking the Department, no." (Record at 289).
- 26) Sally Arnbo was asked the following:
- Q Some of the income from some of the pull tabs was reported as bingo income?
- A But as I explained, that was in 2000, 2001, you know, when this was a new ticket and at that point I didn't know where else to put it. I was not – I could not list it as total gross income, because I wasn't listing total gross income, I was listing profit. (Record at 294).
- 27) No one was held accountable for discarding of pull tabs in the trash. (Record at 302).
- 28) There was no financial oversight and no one questioned the discarding of pull tabs. (Record at 302).
- 29) Insurance to cover the loss of pull tabs was considered cost prohibitive. (Record at 303).
- 30) Moving to another location was never an option. (Record at 303).
- 31) The discarded boxes of pull tabs were not accounted for in Anderson's annual renewals or financial statements. (Record at 239-240).
- 32) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed water damaged charity gaming supplies to be discarded by workers and other individuals without keeping any records as to which games or how much was destroyed. (Record at 239-240).
- 33) Lack of proper record keeping and reporting regarding lost, stolen, or destroyed games was the impetus behind the Department's initial investigation of Anderson.
- 34) Sally Arnbo did not reconstruct Anderson's pull tab records, Petitioner's Exhibits X, Y, and Z, until November of 2004. (Record at 301).
- 35) A serious reconstruction and reconciliation by Sally Arnbo of Anderson's charity gaming financial records did not occur until approximately two (2) years after the Department's initial investigation began.
- 36) The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as \$3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003.
- 37) The Petitioner, Sally Arnbo, and Phillip Foley were the only individuals licensed by the State of Indiana as operators for Anderson. (Department's Exhibit #1).
- 38) The Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed charity gaming to

take place without a qualified operator being present. (Record at 200).

39) Ms. Broadwater admitted calling bingo, a job only an operator listed on a CG-13 (Annual Bingo License) is allowed to undertake pursuant to IC 4-32-6-17. (Record at 314-315).

40) Mr. Vanchina admitted calling bingo, a job only an operator listed on a CG-13 (Annual Bingo License) is allowed to undertake pursuant to IC 4-32-6-17. (Record at 322).

41) Calling bingo is when the operator of the bingo game announces a letter and number combination that has been drawn. (See IC 4-32-6-3).

42) Sally Arnbo contends that she requested Lori Broadwater's name be added as an operator on Anderson's charity gaming license. (Record at 274).

43) Sally Arnbo's unsigned letters dated January 12, 2004, February 27, 2004, and June 29, 2004 were introduced into evidence to show her belief that a lack of response by the Department to her requests was a tacit approval. (Petitioner's Exhibits WW, VV, and UU).

44) Petitioner's reliance upon the Department's silence is incorrect. An individual cannot undertake the duties of an operator unless their name appears upon the charity gaming license. If a qualified organization requests an individual be added to its license as an operator, the Department will add that person's name and issue a revised license if they meet the statutory requirements.

45) It is Petitioner's responsibility as an operator for a not-for-profit organization, licensed by the State of Indiana, to ensure that a qualified operator is always present during charity gaming events, and to make sure that only a qualified operator is allowed to run the charity gaming events.

46) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, failed to ensure that Ms. Broadwater's and Mr. Vanchina's names were added to Anderson's license and that the revised license would be posted pursuant to 45 IAC 18-2-4.

47) The Department's letter to Petitioner dated September 3, 2004 stated, "Dr. Philip Foley in an interview with the CID special agent stated Tom Arnbo was never a member of the organization."

48) Petitioner was listed as a member of Anderson's Board of Directors on a letter dated April 26, 1999 introduced into evidence as Petitioner's Exhibit P. Petitioner's name appears on Anderson's license to conduct charity gaming during the periods at issue. (See Department's Exhibits #2, 3, and 4). Petitioner's name appears on Anderson's CG-8 for the Period of September 1, 2000 to August 31, 2001. (See Department's Exhibit #6). Petitioner's name also appears on Anderson's CG-8 for the period September 1, 2001 to August 31, 2002 as the person maintaining the financial records and lists his address. (See Department's Exhibit #8). Petitioner's signature also appears on Anderson's CG-DIST for the period September 1, 2002 to August 31, 2003. (See Department's Exhibit #11). With Petitioner's name appearing on all these documents filed with the Department, and each document signed by Anderson's President, it is inconceivable that Petitioner could not be a member of the organization for the requisite period required by IC 4-32-9-28 to be considered an operator.

STATEMENT OF LAW

1) The Department's hearings are governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.*).

2) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in ...an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts..."

3) IC 4-32-6-17 states, "'Operator' means an individual who is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law." *As added by P.L.24-1992, SEC.47.*

4) IC 4-32-9-23 states, "An operator or a worker may not be a person who has been convicted of or entered a plea of nolo contendere to a felony committed in the preceding ten (10) years, regardless of the adjudication, unless the department determines that:

- (1) the person has been pardoned or the person's civil rights have been restored; or
- (2) subsequent to the conviction or entry of the plea the person has engaged in the kind of good citizenship that would reflect well upon the integrity of the qualified organization and the department." *As added by P.L.24-1992, SEC.50.*

5) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization or an individual under this article..."

6) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:

- (1) Not more than one thousand dollars (\$1,000) for the first violation.
- (2) Not more than two thousand five hundred dollars (\$2,500) for the second violation.
- (3) Not more than five thousand dollars (\$5,000) for each additional violation."

7) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

- (1) Suspend or revoke the license.
- (2) Lengthen a period of suspension of the license.
- (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity

gaming conducted by a qualified organization.

(4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

- 1) The purpose of Indiana's charity gaming statutes is to permit a licensed qualified charitable organization to conduct gambling as a fund raising activity for lawful purposes of the organization.
- 2) To this end, the Indiana Department of State Revenue is responsible for ensuring the security and integrity of the operation of games of chance under Article 32.
- 3) Pursuant to IC 4-32-9-17 a qualified organization shall maintain accurate records and reports of all financial aspects of an allowable event under Article 32.
- 4) The Petitioner allowed charity gaming to take place without a qualified operator being present.
- 5) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, was responsible for ensuring that a qualified operator was always present during charity gaming events, and to make sure that only a qualified operator was allowed to run the charity gaming events.
- 6) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, failed to ensure that Ms. Broadwater's and Mr. Vanchina's names were added to Anderson's license and that the revised license would be posted.
- 7) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed water damaged charity gaming supplies to be thrown out by workers and other individuals without keeping any records as to which games or how much was destroyed.
- 8) The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as \$3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003.
- 9) Petitioner's inability to accurately account for Anderson's lost, stolen, destroyed, or giveaway pull tabs is a direct reflection on how the organization is conducting its gaming. The burden cannot be shifted to the Department by arguing that its attempt at reconstruction is flawed. The burden rests with the Petitioner to show that the financial filings sent to the Department accurately reflect its fund raising activities. In this case they did not.
- 10) Pursuant to IC 4-32-12-3 the Department may prohibit an individual who has been found to be in violation of this article (IC 4-32) from associating with charity gaming conducted by a qualified organization.
- 11) IC 4-32-6-17 defines the term "Operator."
- 12) Petitioner was listed as an operator for Anderson during the periods at issue.
- 13) An operator is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law.
- 14) The Department, in its letter dated September 3, 2004, stated that the Petitioner will not be considered as an operator on any charity gaming application either now or in the future.
- 15) This is in effect a perpetual ban against Petitioner ever participating as an operator.
- 16) Even an individual, who has been convicted of or entered a plea of nolo contendere to a felony, may once again participate in charity gaming once the ten (10) year restriction has passed.
- 17) The Indiana Statutes and Administrative Rules governing charitable organizations and charity gaming do not provide for an unlimited suspension.
- 18) Therefore, the maximum length of suspension cannot exceed ten (10) years.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Department's decision to suspend Petitioner is hereby upheld. However, the Petitioner's suspension cannot exceed ten (10) years. The Department is therefore directed to modify Petitioner's suspension accordingly.

1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue (100 North Senate Avenue, Room N248, Indianapolis, Indiana 46204-2253), a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).

2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE**IN REGARDS TO THE MATTER OF:**

**SALLY ARNBO
5083 STONESPRING WAY
ANDERSON, IN 46012
DOCKET NO. 29-2004-0338-B**

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND PROPOSED DEPARTMENTAL ORDER**

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FINDINGS OF FACTS

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(Department's Exhibits #2, 3, and 4).

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19) During cross examination Petitioner was asked,

"Q And the bingo applications and the reapplications that we had introduced into evidence earlier, did you fill those applications out?

A Pretty much, yes. In total, yes, pretty much, but not total.

Q What part didn't you fill out?

A Well, I didn't fill the distribution, the part that Dr. Foley gave to Tom. Other than that, I pretty much filled the rest of it out." (Record at 278).

20) Anderson's building was prone to water damage, especially where the charity gaming supplies were kept, as evidenced by Petitioner's Exhibits BB through KK.

21) Petitioner, when asked, "how bad would you say the water problem was before the landlord made the repairs?" stated, "The water problem was terrible and we complained to him many, many times about it, showed it to him, you know, and said, you know, you've got water, you know, there were times when literally we could see it running and we put garbage cans up when it was dripping out of the ceiling, so it was bad. It was bad. Sometimes worse than other times. (Record at 241).

22) Petitioner testified under oath that as many as two thousand (2,000) boxes of pull tabs were discarded in the trash. (Record at 239).

23) Petitioner testified under oath that no inventory of discarded pull tabs was ever undertaken. (Record at 301).

24) The Department asked the Petitioner, "During the time that you had the losses from the spoiled pull tabs, did you ever consider asking the Department, 'How should I account for these?'" Petitioner responded, "No sir, I didn't. I asked the distributors, 'Would you take this back' and, or course, they wouldn't and I didn't know what else to do with them and I never thought about asking the Department, no." (Record at 289).

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30) Petitioner testified under oath that the discarded boxes of pull tabs were not accounted for in Anderson's annual renewals or financial statements. (Record at 239-240).

31) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed water damaged charity gaming supplies to be discarded by workers and other individuals without keeping any records as to which games or how much was destroyed. (Record at 239-240).

32) Lack of proper record keeping and reporting regarding lost, stolen, or destroyed games was the impetus behind the Department's initial investigation of Anderson.

33) Petitioner did not reconstruct Anderson's pull tab records, Petitioner's Exhibits X, Y, and Z, until November of 2004. (Record at 301).

34) A serious reconstruction and reconciliation by Petitioner of Anderson's charity gaming financial records did not occur until approximately two (2) years after the Department's initial investigation began.

35) The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as \$3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003.

36) The Petitioner, Tom Arnbo, and Phillip Foley were the only individuals licensed by the State of Indiana as operators for Anderson. (Department's Exhibit #1).

- 37) The Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed charity gaming to take place without a qualified operator being present. (Record at 200).
- 38) Ms. Broadwater admitted calling bingo, a job only an operator listed on a CG-13 (Annual Bingo License) is allowed to undertake pursuant to IC 4-32-6-17. (Record at 314-315).
- 39) Mr. Vanchina admitted calling bingo, a job only an operator listed on a CG-13 (Annual Bingo License) is allowed to undertake pursuant to IC 4-32-6-17. (Record at 322).
- 40) Calling bingo is when the operator of the bingo game announces a letter and number combination that has been drawn. (See IC 4-32-6-3).
- 41) Petitioner contends that she requested Lori Broadwater's name be added as an operator on Anderson's charity gaming license. (Record at 274).
- 42) Petitioner's unsigned letters dated January 12, 2004, February 27, 2004, and June 29, 2004 were introduced into evidence to show her belief that a lack of response by the Department to her requests was a tacit approval. (Petitioner's Exhibits WW, VV, and UU).
- 43) Petitioner's reliance upon the Department's silence is incorrect. An individual cannot undertake the duties of an operator unless their name appears upon the charity gaming license. If a qualified organization requests an individual be added to its license as an operator, the Department will add that person's name and issue a revised license if they meet the statutory requirements.
- 44) It is Petitioner's responsibility as an operator for a not-for-profit organization, licensed by the State of Indiana, to ensure that a qualified operator is always present during charity gaming events, and to make sure that only a qualified operator is allowed to run the charity gaming events.
- 45) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, failed to ensure that Ms. Broadwater's and Mr. Vanchina's names were added to Anderson's license and that the revised license would be posted pursuant to 45 IAC 18-2-4.

STATEMENT OF LAW

- 1) The Department's hearings are governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.*)
- 2) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in ...an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts..."
- 3) IC 4-32-6-17 states, "'Operator' means an individual who is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law." *As added by P.L.24-1992, SEC.47.*
- 4) IC 4-32-9-23 states, "An operator or a worker may not be a person who has been convicted of or entered a plea of nolo contendere to a felony committed in the preceding ten (10) years, regardless of the adjudication, unless the department determines that:
- (1) the person has been pardoned or the person's civil rights have been restored; or
 - (2) subsequent to the conviction or entry of the plea the person has engaged in the kind of good citizenship that would reflect well upon the integrity of the qualified organization and the department." *As added by P.L.24-1992, SEC.50.*
- 5) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization or an individual under this article..."
- 6) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:
- (1) Not more than one thousand dollars (\$1,000) for the first violation.
 - (2) Not more than two thousand five hundred dollars (\$2,500) for the second violation.
 - (3) Not more than five thousand dollars (\$5,000) for each additional violation."
- 7) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
- (1) Suspend or revoke the license.
 - (2) Lengthen a period of suspension of the license.
 - (3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
 - (4) Impose an additional civil penalty of not more than one hundred dollars (\$100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

- 1) The purpose of Indiana's charity gaming statutes is to permit a licensed qualified charitable organization to conduct gambling as a fund raising activity for lawful purposes of the organization.
- 2) To this end, the Indiana Department of State Revenue is responsible for ensuring the security and integrity of the operation of games of chance under Article 32.
- 3) Pursuant to IC 4-32-9-17 a qualified organization shall maintain accurate records and reports of all financial aspects of an allowable event under Article 32.

Nonrule Policy Documents

- 4) The Petitioner allowed charity gaming to take place without a qualified operator being present.
- 5) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, was responsible for ensuring that a qualified operator was always present during charity gaming events, and to make sure that only a qualified operator was allowed to run the charity gaming events.
- 6) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, failed to ensure that Ms. Broadwater's and Mr. Vanchina's names were added to Anderson's license and that the revised license would be posted.
- 7) Petitioner as an operator for a not-for-profit organization, licensed by the State of Indiana, allowed water damaged charity gaming supplies to be thrown out by workers and other individuals without keeping any records as to which games or how much was destroyed.
- 8) The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as \$3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003.
- 9) Petitioner's inability to accurately account for Anderson's lost, stolen, destroyed, or giveaway pull tabs is a direct reflection on how the organization is conducting its gaming. The burden cannot be shifted to the Department by arguing that its attempt at reconstruction is flawed. The burden rests with the Petitioner to show that the financial filings sent to the Department accurately reflect its fund raising activities. In this case they did not.
- 10) Pursuant to IC 4-32-12-3 the Department may prohibit an individual who has been found to be in violation of this article (IC 4-32) from associating with charity gaming conducted by a qualified organization.
- 11) IC 4-32-6-17 defines the term "Operator."
- 12) Petitioner was listed as an operator for Anderson during the periods at issue.
- 13) An operator is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law.
- 14) The Department, in its letter dated September 3, 2004, stated that the Petitioner will not be considered as an operator on any charity gaming application either now or in the future.
- 15) This is in effect a perpetual ban against Petitioner ever participating as an operator.
- 16) Even an individual, who has been convicted of or entered a plea of nolo contendere to a felony, may once again participate in charity gaming once the ten (10) year restriction has passed.
- 17) The Indiana Statutes and Administrative Rules governing charitable organizations and charity gaming do not provide for an unlimited suspension.
- 18) Therefore, the maximum length of suspension cannot exceed ten (10) years.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Department's decision to suspend Petitioner is hereby upheld. However, the Petitioner's suspension cannot exceed ten (10) years. The Department is therefore directed to modify Petitioner's suspension accordingly.

- 1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue (100 North Senate Avenue, Room N248, Indianapolis, Indiana 46204-2253), a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
- 2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

04-980171.LOF

LETTER OF FINDINGS NUMBER: 98-0171

Sales/Use Tax

For the Period: 1994-1996

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE**I. Sales/Use Tax: Sales/Use Tax Remittance**

Authority: IC 6-2.5-4-10; IC 6-2.5-9-3; IC 6-8.1-5-1.

Taxpayer protests the Department's proposed assessment of sales tax on leased vehicles; the taxpayer also protests the proposed assessment of use tax on mailings.

STATEMENT OF FACTS

The taxpayer is an automobile dealer that sells new and used cars and trucks. More facts will be provided below.

I. Sales/Use Tax: Sales/Use Tax Remittance**DISCUSSION**

The taxpayer protested a handful of issues, many of which were resolved before the hearing stage of the protest. The following were resolved: a sales tax adjustment attributable to the value of vehicle trade-ins on leased vehicles; an error in the calculation of use tax on consumable supplies; use tax on three items; and a portion of the sales tax on trade-in capital cost reductions. Two issues were not resolved and are dealt with in what follows.

The taxpayer states the following in correspondence with the Department.

To briefly summarize, the Company leases vehicles to customers. Typically in such a transaction, the dealership will collect the following from the customer: security deposit, first month lease and a cash down payment (capital cost reduction). The dealer collects sales tax on the first month lease and the cash down payment.

The taxpayer goes on to explain that it (*i.e.*, the dealer) "remitted [sales tax] to the Leasing Company. The leasing company in turn remitted the sales tax in question to the Indiana Department of Revenue."

The auditor describes the issue thusly:

The taxpayer stated that [Company X] Finance Corporation has remitted the taxes on these transactions. The cash down payments in question are part of leases financed through [Company X] Finance Corporation. No documentation was provided by the taxpayer to verify that [Company X] Finance remitted the correct tax on these transactions. However a letter was provided by [Company X] Finance stating the tax was paid.

And further:

The taxpayer collected tax from the customer on these amounts but failed to remit the tax. The taxpayer stated that [Company X] subtracts the tax payments from the payoff on the deal and remits the tax on these cash down payments together with tax collected from monthly lease payments.

The auditor went on to state that as a "retail merchant" the taxpayer "has a duty to remit all taxes collected from customers held in trust for the state."

At hearing the taxpayer argued that the lease is between the customer and the finance company, that the taxpayer (dealership) does not contract with the customer. Taxpayer also noted that at the end of the lease, it is the finance company's car, not the dealer's.

Indiana Code 6-2.5-4-10(a) states that, "A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person," and IC 6-2.5-9-3 says state gross retail or use taxes are held in "trust for the state."

The taxpayer has not cited any statute or regulation that would allow it to collect Indiana sales tax and delegate the duty to remit the tax. Under IC 6-8.1-5-1 the taxpayer bears the "burden of proving that the proposed assessment is wrong," and the "proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." The taxpayer has not met its burden of proof.

In addition, from the file, it is not clear whether or not the taxpayer withdrew its protest of the issue involving use tax on mailings. At hearing the taxpayer did not develop any arguments on the issue. The taxpayer had previously submitted to the Department an invoice from a vendor to support its position. That invoice was for a later time than the audit period.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20020334.LOF

LETTER OF FINDINGS: 02-0334**Indiana Gross Retail Tax****For Tax Periods 1999-2000**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES**I. Gross Retail Tax—Manufacturing exemption**

Authority: Ind. Code § 6-2.5-5-3; 45 IAC 2.2-5-8

Taxpayer argues that a crane, repair and maintenance parts for the crane, certain equipment used to remove non-ferrous items from metal, and various other items related to its operations are exempt as property used in production.

II. Tax Administration: Negligence Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is a business engaged in receiving scrap metal from various sources. Basically, Taxpayer's operations work along these lines: a truck with potential metal for Taxpayer's use arrives at its facility. After weighing, the truck's cargo is then tested for radioactive material. If the material is not radioactive, it is then sorted by crane into metal type (or non-metal type), including a separate pile for certain items not capable of shredding. Any metals then have non-ferrous parts removed, and then the metal proceeds to ultimate shredding. The shredded metals are then sold to users that use the metal in the users' ordinary course of business.

Taxpayer was assessed use tax with respect to aforementioned crane, various items used in the maintenance and repair of the crane, along with other materials used in removing nonferrous materials from metals and cutting metals and items which were not assigned to specific expense accounts. Taxpayer has protested the assessment and resulting negligence penalties.

DISCUSSION**I. Gross Retail Tax—Manufacturing exemption**

Taxpayer argues that a crane used for removing scrap metal from trucks, along with various welding and other materials used in removing nonferrous items from metal, are exempt from Indiana's gross retail (sales) tax as property used in the production of other tangible personal property.

Under Ind. Code § 6-2.5-5-3(b):

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

In addition, 45 IAC 2.2-5-8(c) states:

The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

Finally, 45 IAC 2.2-5-8(k) states:

"Direct production, manufacture, fabrication, assembly, or finishing of tangible personal property" is performance of a series of operations which places tangible personal property in a form, composition, or character different from that in which it was acquired. The change in form, composition, or character must be a substantial change, and it must result in a transformation of property into a different product having a distinctive name, character, and use. Operations such as compounding, fabricating, or assembling are illustrative of the types of operations which may qualify under this definition.

This test requires two steps: direct use and direct production of other tangible personal property. At this point, a series of questions must be addressed. What is the role of the equipment? Is this role an integral part of the process of producing tangible personal property? Is the property changed as a result of the equipment?

Taxpayer argues that the crane used in sorting various metals and other materials qualifies for exemption for use tax based on its use in the production of other tangible personal property. In particular, Taxpayer argues that its production process begins at the moment that Taxpayer tests incoming trucks for radioactivity.

Here, it is difficult to describe the role of the crane as a part of an integrated process that results in the production of other tangible personal property. Most instructive of various examples is 45 IAC 2.2-5-8(c)(4)(G) which states:

4) Because of the lack of an essential and integral relationship with the integrated production system in Example (1), the following types of equipment are not exempt:

...

(G) Equipment used to remove raw materials from storage prior to introduction into the production process or to move finished products from the last step of production.

The role of the crane is to pick out parts from a truck that would bring varied materials into Taxpayer's scrap yard, and then sorts the materials into acceptable items, unacceptable items, and items that require further work. The steps taken by Taxpayer at this point do not transform the metal as required by the regulation. Rather, the crane is moving the metal from storage-a delivery truck- to some future stage. This does not constitute part of an "essential and integrated relationship with the integrated production system". Until the metal is shredded or otherwise acted upon in a manner that otherwise transforms it, production has not begun. Accordingly, Taxpayer's protest is denied.

With respect to the various items used in maintenance of the crane, it is true that the repair and maintenance supplies for the

crane are exempt from sales tax- if the crane is part of the process that produces other tangible personal property under 45 IAC 2.2-5-8(h)(2). Given that the crane is not used in the production of other property, the resulting repair and maintenance parts are not exempt.

With respect to the items used in removing nonferrous items from metal or cutting metal given to Taxpayer, Taxpayer has presented sufficient information to conclude that the production of other property begins at this point for the nonferrous items, and therefore the items in controversy, to the extent the items are used for nonferrous items, are exempt from sales tax.

Finally, Taxpayer protests several items that were not assigned to specific expense accounts, stating that the items were also used in production. Taxpayer has not provided sufficient information to conclude that those items were used in an exempt manner, and is accordingly denied.

FINDING

Taxpayer's protest is denied with respect to the crane, repair parts for the crane, maintenance parts for the crane and any other items that transport metals that need no further work prior to shredding. Taxpayer's protest is sustained with respect to items that relate to removing nonferrous items from metals and cutting metals it receives, and tangible personal property used on such metals after the removal of nonferrous materials. Taxpayer's protest is denied to items that were not assigned to a specific expense account due to insufficient information.

II. Tax Administration: Negligence Penalty

The Department may impose a ten percent (10%) negligence penalty. IC 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to timely file income tax returns, generally, will result in penalty assessment. IC 6-8.1-10-2.1(a)(1). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...." *Id.*

With respect to the penalty, Taxpayer has not provided sufficient information to permit penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020573.LOF

LETTER OF FINDINGS NUMBER: 02-0573

Adjusted Gross Income Tax

For the Tax Period 1998

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Adjusted Gross Tax-Imposition

Authority: IC 6-8.1-5-1(b), IC 6-3-2-1(a), IC 6-3-2-2.5(a).

The taxpayer protests the assessment of adjusted gross income tax on certain receipts.

STATEMENT OF FACTS

The taxpayer is a married couple. They filed their Indiana tax return and paid their total Indiana adjusted gross income tax liability for 1996-1998. Subsequently the Internal Revenue Service audited the taxpayer's federal return for the years 1996-1998. The audit resulted in two adjustments increasing the taxpayer's federal adjusted gross income tax liability. The taxpayer paid one liability and negotiated a settlement with the Internal Revenue Service (IRS) to satisfy the other federal liability. The IRS notified the Indiana Department of Revenue (department) of the federal audit adjustments for the three year period. The department then recalculated the taxpayer's Indiana income tax liability based upon the federal changes for the tax year 1998. The taxpayer agreed with one of the adjustments and paid the resulting tax liability. The taxpayer protested the assessment of tax, interest, and penalty based on the other adjustment. A hearing was held and this Letter of Findings results.

1. Adjusted Gross Income Tax-Imposition

DISCUSSION

As a result of the IRS audit, the taxpayer's federal adjusted gross income was changed for the years 1996-1998. Since the Indiana adjusted gross income is determined by modifying the federal adjusted gross income tax, the change in the federal adjusted gross income tax required a corresponding change in the Indiana adjusted gross income tax. The taxpayer did not make this change and amend its returns for the years of the federal tax audit. The department became aware of the federal adjustments and made the corresponding adjustment in the taxpayer's Indiana gross income for 1998. The adjustment in the taxpayer's Indiana adjusted gross income resulted in a deficiency of Indiana income taxes paid in 1998. The department's recomputation of the 1998 income tax based upon the adjusted Indiana adjusted gross income tax was proper.

After the federal audit, the taxpayer filed an action against the IRS to recover the additional federal income taxes it paid pursuant to the audit. This lawsuit was settled with the United States Government refunding the taxpayer fifty percent (50 %) of the taxes they had paid as a result of the audit. The taxpayer argues that since they settled with the IRS for fifty (50) cents on the dollar, the department should correspondingly reduce their Indiana adjusted gross income tax liability by fifty percent (50%).

All department assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b). Indiana imposes the adjusted gross income tax on Indiana residents. IC 6-3-2-1(a). The Indiana adjusted gross income is calculated by starting with the federal adjusted gross income and making certain statutory modifications. IC 6-2-2.5(a).

The department disagrees with the taxpayer's conclusions. The settlement documents presented in association with the hearing give no indication that the IRS ever actually reduced the taxpayer's federal adjusted gross income. Rather, the settlement documents states specifically that the parties are "willing to settle this matter for fifty (50%) percent of the amount paid, plus statutory interest from January 2, 2002." At no point does the settlement documentation indicate that the taxpayer's actual federal adjusted gross income was reduced.

The department properly calculated the taxpayer's Indiana adjusted gross income tax based upon the taxpayer's federal adjusted gross income as reflected in the Revenue Agent's Report associated with the federal adjusted gross income tax audit for the tax year 1998.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030355.LOF

LETTER OF FINDINGS NUMBER 03-0355

RESPONSIBLE OFFICER

SALES TAX and WITHHOLDING TAX

For Tax Period 1993-1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUE

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b), *Ball v. Indiana Department of Revenue*, 525 N.E.2d 356, affirmed 563 N.E.2d 522 (1988).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

STATEMENT OF FACTS

The taxpayer was the president of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1993-1999. The Indiana Department of Revenue (department) assessed the outstanding corporate withholding and sales taxes, interest, and penalty against the taxpayer personally. The taxpayer protested the assessment. The assessments for June, 1999 were cancelled by the department prior to the hearing which was held on March 7, 2005. This Letter of Findings results.

Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

First the taxpayer argued that the amounts assessed were incorrect. The taxpayer provided the department with copies of several checks in support of this contention. The department traced these checks and determined that each had been properly applied to the

taxpayer's liabilities. The taxpayer was given full credit for the payments. The other documentation submitted by the taxpayer was not in a form that the department could trace. The taxpayer did not provide documentation sufficient to sustain his burden of proving that the assessments were calculated incorrectly.

The taxpayer also argued that it was unnecessarily duplicative and redundant for the department to assess the corporate taxes against him personally. The taxpayer contended that he had already taken personal responsibility for the taxes and was currently paying \$100.00 per month to satisfy the corporate liability. Therefore there was no need for the state to go through the administrative procedures of officially assessing the unpaid corporate taxes against him personally.

The taxpayer offered the case of *Ball v. Indiana Department of Revenue*, 525 N.E.2d 356, affirmed 563 N.E.2d 522 (1988) in support of his contention. In that case, the department issued a notice for payment of trust fund taxes to a corporation. Several years later the department assessed those same trust taxes personally against Mr. Ball. He argued that he was denied due process because the department failed to give him notice of the tax assessment at the same time that notice was originally sent to the corporation. The Court held that separate and additional notice to the responsible officer of a corporation liable for trust fund taxes is not required where there is timely notice to the corporation of the assessment. Therefore the corporate trust fund tax assessment against Mr. Ball did not violate the Statute of Limitations or Mr. Ball's due process rights.

The taxpayer argues that there is no question that he knew of the trust tax assessment against the corporation. Further the taxpayer argues that he has assumed responsibility for the payment of the trust fund taxes as evidenced by his monthly payments on the outstanding liability. Therefore it was redundant and unduly duplicative for the department to bill him individually for the corporate trust taxes as a responsible officer.

The department agrees that it is not necessary for the department to bill the responsible officer separately for trust fund taxes. However, nothing precludes the department from doing so. In fact, the Court in the *Ball* case had the opportunity to say that the department could not personally assess Mr. Ball. The Court did not do so. Rather it agreed that the personal assessment against Mr. Ball for the trust taxes was proper.

Although the department is not required to assess corporate trust fund taxes personally against responsible parties, the department may do so pursuant to IC 6-2.5-9-3 and IC 6-3-4-8 (f). In this case, the department chose to assess the corporate trust fund taxes personally against the taxpayer. The taxpayer failed to sustain his burden of proving that it was an inappropriate assessment.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030391.LOF

LETTER OF FINDINGS NUMBER: 03-0391

SALES TAX

For Years 2000 and 2001

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales Tax—Assessment of Sales Tax on sales to an “out-of-state” customer

Authority: IC 6-8.1-5-1(b); IC 6-2.5-2-1; IC 6-2.5-8-8; IC 6-2.5-3-7; IC 6-2.5-6-7; IC 6-2.5-4-1(e).

Taxpayer protests the assessment of sales tax on sales Taxpayer claims were made to an out-of-state customer.

II. Use Tax—Assessment of Use Tax on Forklift

Authority: IC 6-2.5-3-2(a); IC 6-2.5-3-3; IC 6-2.5-3-4; IC 6-2.5-3-5; IC 6-2.5-5-3; IC 6-8.1-5-1(b).

Taxpayer protests the assessment of use tax on forklift used at its facility.

STATEMENT OF FACTS

Taxpayer operates an Indiana location that sells masonry stones to various contractors. Taxpayer purchases limestone blocks and processes the raw material according to each customer's specifications—which includes cutting the blocks to various sizes.

Taxpayer engaged in retail transactions with an out-of-state company and did not charge sales tax. The out-of-state customer picked up the tangible personal property at Taxpayer's Indiana location and used the materials to complete a job at an Indiana worksite. The customer was not registered as an Indiana retail merchant and did not issue an Indiana exemption certificate. The Department assessed Taxpayer for the sales tax that was not collected.

Taxpayer purchased a forklift, which is used to move and hold limestone slabs. The auditor determined that the forklift was not used in an exempt manner and the Department assessed use tax.

I. Sales Tax—Assessment of Sales Tax on sales to “out-of-state” customers**DISCUSSION**

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-2.5-2-1 imposes an excise tax, commonly known as sales tax, on retail transactions made in Indiana. The person who acquires property in a retail transaction is liable for the sales tax due on the transaction and is required to pay the tax to the retail merchant. *Id.* The retail merchant is required to collect the tax as agent for the state. *Id.* IC 6-2.5-8-8 states that a person who makes a purchase which is exempt from the sales or use taxes may issue an exemption certificate to the seller to not be charged the tax. The person is required to provide the seller with a valid Indiana exemption certificate prescribed and approved by the Department. *See id.* A seller who accepts a proper exemption certificate has no duty to collect or remit the sales or use tax that otherwise would be due on that purchase. *Id.* IC 6-2.5-3-7 states that a person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption. A retail merchant is not required to produce evidence of non-taxability if the retail merchant receives a valid Indiana exemption certificate from the person who acquired the property. *See id.* IC 6-2.5-6-7 requires a retail merchant to pay to the Department the sales tax due on taxable transactions regardless of whether the merchant actually collected the sales tax due.

Here is the concise summation of the statutes outlined above. When a person makes a purchase in Indiana, he is required to pay the sales tax to the merchant. The merchant is required to collect the sales tax, and must charge the sales tax unless the merchant receives a valid Indiana exemption certificate from the person making the purchase. A merchant is required to submit the sales tax due on taxable purchases, whether or not the merchant collected the sales tax due.

In this case, Taxpayer states that it was given an exemption certificate issued by the State of Illinois. Taxpayer received an order from an Illinois customer. Taxpayer prepared the order and the Illinois customer came to Taxpayer’s location in Indiana and hauled away the purchase in the customer’s own truck.

Taxpayer is required to collect sales tax on all sales that are delivered in Indiana. Taxpayer is not to consider from where a customer comes—but is to determine where the transfer of property is made. If the transfer is made in Indiana, sales tax is due. The only exemption certificates that are valid to abate the collection of Indiana sales tax are those exemption certificates that are approved by the Indiana Department of Revenue; an Illinois certificate does not meet this requirement. For this reason, Taxpayer is liable for the sales tax that it should have collected but did not. Under Indiana statute, a transfer of property occurs at the point where Taxpayer no longer has control of and liability for the property. *See* IC 6-2.5-4-1(e). In this case, Taxpayer transferred the property to the Illinois customer at Taxpayer’s Indiana location, from where the customer drove away with the property.

FINDING

For the reasons stated above, Taxpayer’s protest is denied.

II. Use Tax—Assessment of Use Tax on Forklift**DISCUSSION**

IC 6-2.5-3-2(a) imposes an excise tax, known as the use tax, on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction. The use tax is imposed at the same rate as the Indiana sales tax, IC 6-2.5-3-3, but credit against the amount owed is given for sales or use tax paid in Indiana or elsewhere in the United States. *See* IC 6-2.5-3-4 and IC 6-2.5-3-5. IC 6-2.5-3-4 exempts from use tax property acquired in a transaction that is wholly or partially exempt from sales tax and the property is being used, stored, or consumed for the purpose for which it was exempted. If a person purchases tangible personal property exempt from sales and use tax but subsequently uses, stores, or consumes that property for a nonexempt purpose, then the person is required to pay the use tax. *Id.* IC 6-2.5-5-3 grants an exemption for manufacturing machinery, tools, and equipment acquired for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

Taxpayer purchased a forklift and did not pay sales tax. The forklift is used to move and hold limestone slabs in processing. The auditor determined that the forklift is not used in an exempt manner. Taxpayer explained the use of the forklift to the hearing officer and also provided a brief written explanation and has demonstrated that the forklift is being used in an exempt manner.

FINDING

For the reasons stated above, Taxpayer’s protest is sustained.

DEPARTMENT OF STATE REVENUE

0120030393.LOF

LETTER OF FINDINGS NUMBER: 03-0393**Individual Income Tax****For the Years 1993 and 1995-1999**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Individual Income Tax—S-corporation distributions to nonresident shareholders

Authority: IC 6-8.1-5-1(b); IC 6-3-2-1; IC 6-3-2-2; IC 6-8.1-5-2(a) and (e); 45 IAC 3.1-1-2; 45 IAC 3.1-1-7; 45 IAC 3.1-1-25; 45 IAC 3.1-1-66; 45 IAC 3.1-1-109.

Nonresident taxpayer protests the assessment of adjusted gross income tax on his share of taxable Indiana S-corporation income.

STATEMENT OF FACTS

Taxpayer is a nonresident shareholder of an Indiana S-corporation. Taxpayer is a Kentucky resident. He is president and 33% shareholder of the corporation. A review of the Indiana report processing system revealed that Taxpayer failed to file any Indiana income returns for 1993 and 1995 through 1999. A return was filed in 1994. The Department assessed income tax for the years in question. Taxpayer filed a protest and a hearing was held.

I. Individual Income Tax—S-corporation distributions to nonresident shareholders

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-3-2-1 imposes an income tax on every nonresident person who has adjusted gross income derived from sources within Indiana. IC 6-3-2-2 defines "adjusted gross income derived from sources within Indiana." It includes distributive shares from an Indiana S-corporation to shareholders; 45 IAC 3.1-1-2 specifically states that nonresidents are required to report the income. 45 IAC 3.1-1-7 states that earnings from S-corporations are not subject to nonresident reciprocity. 45 IAC 3.1-1-25 outlines the tax liability obligations of a taxpayer, stating, "All persons who are not residents of Indiana are required to report that portion of their entire income directly or constructively from or attributable to business, activities or any other source within Indiana...."

45 IAC 3.1-1-66 specifically addresses S-corporations and shareholders. The regulation states that S-corporation shareholders are taxed on their distributive shares of income at the individual income tax rate. 45 IAC 3.1-1-109 requires S-corporations to withhold adjusted gross income tax and county adjusted gross income tax on any nonresident shareholder's share of taxable income of the corporation, whether distributed or undistributed. The S-corporation is required to pay the withheld amounts to the Department and to furnish a copy of form WH-18, **Indiana Miscellaneous Withholding Tax Statement for Nonresidents**, to each nonresident shareholder. *Id.*

There are time limits imposed upon the Department to make assessments against a taxpayer. In general, the Department has three years to make an assessment. IC 6-8.1-5-2(a). But there is no time limit if no return has been filed. IC 6-8.1-5-2(e).

Taxpayer was required to file an Indiana adjusted gross income tax return and failed to do so. As well, he failed to pay the adjusted gross income tax due on distributions from an Indiana S-corporation.

FINDING

For the reasons stated above, Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030414.LOF

LETTER OF FINDINGS: 03-0414

Indiana Gross Retail Tax

For 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Farm Equipment – Gross Retail Tax.

Authority: IC 6-2.5-5-1; IC 6-2.5-5-2; IC 6-8.1-5-1(b); IC 6-2.5-5-2(b)(3); Graham Creek Farms v. Indiana Dept. of State Revenue, 819 N.E.2d 151 (Ind. Tax. Ct. 2004); Rotation Prods. Corp. v. Department of State Revenue, 690 N.E.2d 795 (Ind. Tax Ct. 1998). Foursquare Tabernacle Church of God in Christ v. State Bd. of Tax Comm'rs, 550 N.E.2d 850 (Ind. Tax Ct. 1990); 45 IAC 2.2-5-6(d).

Taxpayer argues that the purchase of a "skid-steer" loader and three loader buckets was exempt from sales tax and that he is not required to now pay use tax.

STATEMENT OF FACTS

Taxpayer is in the business of raising beef cattle. In 2000, taxpayer purchased a "skid-steer" and three different sized buckets for use with the "skid-steer." Taxpayer did not pay sales tax at the time the purchase was made. The Department of Revenue

(Department) subsequently conducted an audit of the particular dealership from which taxpayer purchased the equipment. The Department concluded that the purportedly exempt purchase of the equipment was “doubtful.” In July of 2003, the Department issued a notice of “Proposed Assessment” stating that taxpayer owed use tax. Taxpayer disagreed with the assessment arguing that the equipment was purchased for an exempt purpose. Taxpayer submitted a protest, an administrative hearing was held, and this Letter of Findings results.

DISCUSSION

I. Farm Equipment – Gross Retail Tax.

Taxpayer claims that the purchase of the “skid-steer” and the three loading buckets was not subject to sales tax and that the Department’s subsequent assessment of use tax is unwarranted.

Taxpayer raises between 15 and 20 beef cattle each year. During the winter, the cattle are housed in one of two barns. Taxpayer states that the “skid-steer” is used to remove animal waste from the barns. During the summer, the cattle are pastured. During the time the cattle are pastured, the “skid-steer” is used to transport hay and feed to the cattle.

Indiana imposes a sales tax on “retail transactions made in Indiana.” IC 6-2.5-2-1(a). Indiana also imposes a functionally related use tax on the purchase of certain non-exempt tangible property that has escaped sales tax. Graham Creek Farms v. Indiana Dept. of State Revenue, 819 N.E.2d 151, 155 (Ind. Tax. Ct. 2004).

IC 6-2.5-5-1 and IC 6-2.5-5-2 provide a use tax exemption for tangible personal property used for agricultural purposes. IC 6-2.5-5-1 provides as follows:

Transactions involving animals, feed, seed, plants, fertilizer, insecticides, fungicides, and other tangible personal property are exempt from the state gross retail [sales] tax if:

- (1) the person acquiring the property acquires it for his direct use in the direct production of food and food ingredients or commodities for sale or for further use in the production of food or commodities for sale; and
- (2) the person acquiring the property is occupationally engaged in the production of food and food ingredients or commodities which he sells for human or animal consumption or uses for further food and food ingredient or commodity production.

IC 6-2.5-5-2 provides that:

Transactions involving agricultural machinery, tools, and equipment are exempt from the [sales] tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities.

(b) Transactions involving agricultural machinery or equipment are exempt from the [sales] tax if:

- (1) the person acquiring the property acquires it for use in conjunction with the production of food and food ingredients or commodities for sale;
- (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food and food ingredients or commodity production; and
- (3) the machinery or equipment is designed for use in gathering, moving, or spreading animal waste.

IC 6-2.5-5-1 and IC 6-2.5-5-2 require that a taxpayer claiming the exemption to be engaged in the direct production of food. “[T]he tangible personal property for which the taxpayer seeks the exemption must be integral and essential to its production process....” Graham Creek Farms, 819 N.E.2d at 156.

Taxpayer claims that the “skid-steer” and loading buckets are exempt from use tax. Therefore, taxpayer bears the burden of demonstrating how this equipment falls within the exemption set out in IC 6-2.5-5-1 and IC 6-2.5-5-2. Foursquare Tabernacle Church of God in Christ v. State Bd. of Tax Comm’rs, 550 N.E.2d 850, 854 (Ind. Tax Ct. 1990). The notice of proposed assessment sent to taxpayer is “prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” IC 6-8.1-5-1(b). However, a tax exemption must not be read so narrowly “so as to exclude cases rightly falling within the ambit of that exemption provision.” Rotation Prods. Corp. v. Department of State Revenue, 690 N.E.2d 795, 797 (Ind. Tax Ct. 1998).

The Department’s proposed assessment is based on the conclusion that the exempt purchase of the equipment was “suspicious.” Taxpayer has stated that he is in the business of raising beef cattle, that the equipment is used to remove animal waste from the barns housing the cattle during the winter, and that the equipment is used to transport hay and feed to the cattle during the time the cattle are pastured. Taxpayer has stated that the equipment is not used for any plainly non-exempt purposes such as snow removal or road maintenance. Taxpayer has explained how the “skid-steer” and the buckets were specifically chosen because the barns have low ceilings and because the confined space within the barns limits the mobility of the equipment. Therefore, to the extent that taxpayer uses the “skid-steer” for “gathering, moving, or spreading animal waste,” the purchase of the “skid-steer” is exempt from sales or use tax. IC 6-2.5-5-2(b)(3).

However, to the extent that taxpayer uses the “skid-steer” to transport hay and other animal feed to cattle during the time the cattle are pastured, the “skid-steer” is not exempt. 45 IAC 2.2-5-6(d) provides in part as follows:

Sales of agricultural machinery, tools, and equipment used by the purchaser directly in feeding exempt animals, poultry, etc., are exempt from tax. *This exemption does not extend to the machinery, equipment, and tools used for the handling, movement, transportation or storage of feed prior to the actual feeding process. (Emphasis added).*

The “skid-steer” is not used to directly feed taxpayer’s cattle; it is an item of equipment used to transport hay and feed prior to the actual feeding process. Therefore, to the extent that taxpayer uses the “skid-steer” to transport hay and feed to the pastured cattle, the “skid-steer” is not exempt.

The taxpayer’s “skid-steer” is used partially for exempt purposes and partially for non-exempt purposes. This means that use tax liability is apportioned based upon the extent of exempt use and the extent of non-exempt use. Taxpayer may obtain an “Agricultural Equipment Exemption Usage Questionnaire” from the Department’s Tax Compliance Division to assist in calculating the apportionment factor and the amount of use tax owed the state.

FINDING

Taxpayer’s protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

0220030423.LOF

LETTER OF FINDINGS: 03-0423

Indiana Corporate Income Tax For the Years 1994 through 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department’s official position concerning a specific issue.

ISSUE

I. Disallowance of Royalty Expenses – Adjusted Gross Income Tax.

Authority: IC 6-3-2-2(l); IC 6-8.1-5-1(b); 45 IAC 3.1-1-62.

Taxpayer challenges an audit decision to disallow royalty expenses paid to an affiliated company during 1994 through 1997.

STATEMENT OF FACTS

Taxpayer is an out-of-state company in the business of providing information technology. Taxpayer provides service and support to business corporations and government agencies within the United States and throughout the world. During 2003, the Department of Revenue (Department) conducted an audit review of taxpayer’s income tax returns and business records. The audit review determined that taxpayer owed additional Indiana corporate income taxes. Accordingly, the Department sent taxpayer notices of “Proposed Assessment.” Believing that the audit erred in the disallowance of certain royalty expenses, taxpayer submitted a protest challenging the additional assessments. An administrative hearing was conducted during which taxpayer’s representative explained the basis for the protest. This Letter of Findings results.

DISCUSSION

I. Disallowance of Royalty Expenses – Adjusted Gross Income Tax.

Taxpayer challenges the audit’s decision to disallow certain royalty expenses purportedly paid to an affiliated Bermuda company during 1994 through 1997.

The audit’s decision to disallow the 1994/97 royalty expenses stems from its initial decision to disallow royalty expenses paid to an affiliated company during 1998 through 2000 which were the three years actually under audit. The 1998/2000 royalty expenses were paid to a foreign corporation, incorporated in Bermuda, which was formed for the purpose of holding certain of taxpayer’s tradenames, trademarks, and service marks. This “intellectual property” had previously been directly owned by taxpayer.

The audit disallowed the claimed 1998/2000 royalties expenses because the audit found that the initial transfer of the intellectual property to the Bermuda company and the subsequent agreement to pay royalties to the Bermuda company were without “economic substance.” The audit found that the transfer of the intellectual property and the royalty agreements were “but sham transactions between [taxpayer] and some of the affiliated companies.” The audit concluded that it could “not be considered a sound business transaction to transfer or sell a business asset to one self [sic], in order to make an expenditure to buy the same business back, from one self [sic], at a greater value than [taxpayer] transferred or sold it.”

The audit disallowed the 1998/2000 royalty payments pursuant to IC 6-3-2-2(l) which states as follows:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer’s income derived from sources within the state of Indiana, the taxpayer may petition for *or the department may require*, in respect to all or any part of the taxpayer’s business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of any one (1) or more of the factors;
- (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer’s income derived from sources within the state of Indiana; or
- (4) the employment of any other methods to effectuate an equitable allocation and apportionment of the taxpayer’s

income. (*Emphasis added*).

The audit also relied upon 45 IAC 3.1-1-62 which states in part that, “All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k)... unless such provisions do not result in a division of income which fairly represents the taxpayer’s income from Indiana sources.”

Having concluded that the royalty expenses paid during 1998/2000 were without economic substance, the audit concluded that “The disallowance of royalty fee expenses from the federal tax return would correct the distortion of income and present a more fair[] representation of the company’s income from Indiana sources.”

Taxpayer agrees that the audit correctly disallowed the 1998/2000 royalty payments. “[Taxpayer] is in agreement with the proposed adjustments made to the reallocation of receipts for purposes of Gross Income Tax [sic] calculation for the tax years ending September 30, 1998 – September 30, 2000.”

However, the audit did not confine itself to considering the royalty payments paid to the Bermuda company during 1998/2000. The audit also made adjustments effectively disallowing the royalty expenses paid during 1994/97 in order to correct the NOL (Net Operating Loss) deduction coming forward to the years actually under audit. Because the actual amount of royalty payments paid during 1994/97 was unavailable at the time of the audit, an “average royalty and commission” was employed as the “best information available.”

It is these 1994/97 payments which are at the heart of taxpayer’s protest. Taxpayer agrees that the 1998/2000 royalty payments were correctly disallowed. However, taxpayer points out that the royalty agreement between itself and the Bermuda company was not entered until 1998 and that “no royalty expense was paid by [taxpayer] until that fiscal year ended.” In other words, taxpayer states that the audit’s 1994/97 adjustments were founded upon non-existent royalty payments.

Taxpayer has provided a copy of the royalty agreement between itself and its associated Bermuda company. As taxpayer maintains, the agreement was “made effective as of October 1, 1998.” Nonetheless, taxpayer’s principal assertion – that it paid no royalties during 1994/97 – is refuted by taxpayer’s own federal income tax returns. Specifically, taxpayer’s support schedule for its 1996 federal 1120 income tax return states that taxpayer claimed deductions of approximately \$37,000,000 in “COMMISSIONS & ROYALTIES.”

Taxpayer was asked to explain the discrepancy between its claim that it did not pay royalties during 1994/97 and the information contained on the federal support schedule. Taxpayer declined to comment.

The evidence provided is inconclusive. The royalty agreement with the Bermuda company was not in effect until 1998. The audit employed what it regarded as the “best information available” to determine the 1994/97 royalty payments and to recalculate the NOL. Taxpayer’s federal return clearly demonstrates that taxpayer paid substantial amounts of money in the form of royalty payments during 1996. When asked subsequent to the hearing to provide an explanation for the 1996 royalty payments, taxpayer failed to respond.

The audit acted within its authority to calculate taxpayer’s 1994/97 royalty payments. IC 6-8.1-5-1(a) provides in the part that “If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the basis of the best information available to the department.” (*Emphasis added*).

In the face of taxpayer’s failure to explain the nature and substance of the 1996 royalty expenses, the Department is unable to agree that the audit’s conclusion concerning the 1994/97 royalty payment was unwarranted. As set out in IC 6-8.1-5-1(b), “The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” Taxpayer’s bare assertion – that the agreement between itself and the Bermuda company was not in effect until 1998 – does not meet the burden of proving that the proposed assessments are wrong.

FINDING

Taxpayer’s protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220030433.LOF

LETTER OF FINDINGS: 03-0433

Indiana Gross Income Tax

For the Year 1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department’s official position concerning a specific issue.

ISSUES

I. Money Received in an Agency Capacity – Gross Income Tax.

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); 45 IAC 1-1-54; 45 IAC 1-1-54(1); 45 IAC 1-1-54(2); 45 IAC 1.1-1-2; 45 IAC

1.1-6-10; Western Adjustment and Inspection Co. v. Gross Income Tax Division, 142 N.E.2d 630 (Ind. 1957); Policy Management Systems Corp. v. Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999); Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809 (Ind. Tax Ct. 1998); Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816 (Ind. Tax Ct. 1998); Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) Universal Group Ltd. v. Indiana Dept. of Revenue, 609 N.E.2d 48 (Ind. Tax Ct. 1993).

Taxpayer argues that it is not subject to Indiana gross income tax on money received while purportedly acting as an agent for a riverboat owner.

II. Abatement of the Ten-Percent Negligence Penalty.

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department exercise its discretion to abate the ten-percent negligence penalty on the ground the money taxpayer received to operate the riverboat and pay riverboat employees was properly excluded from gross receipts for gross income tax purposes.

STATEMENT OF FACTS

Taxpayer operates but does not own a riverboat casino located in Indiana. Taxpayer signed a contract with the riverboat owner to manage the day-to-day operations of the Indiana casino on behalf of the casino owner. The Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax return. In that audit, the Department concluded taxpayer had received money from the casino owner which was subject to gross income tax. Taxpayer disagreed with this conclusion arguing that the money was received from the casino owner while taxpayer was acting in an agency capacity and that, as a result, the money was not subject to gross income tax. Taxpayer submitted a protest to that effect.

A protest was also submitted on behalf of the holding company which acquired taxpayer subsequent to 1997. The holding company raised the identical agency issue, and a previous Letter of Findings (02-20030248) addressed the holding company's protest. However, taxpayer declined to participate in an administrative hearing addressing strictly the 1997 gross income tax assessment. This Letter of Findings was written based upon the original protest letter taxpayer submitted to the Department in March of 2002 and upon the information made available as a result of the holding company's protest.

DISCUSSION

Casino owner and taxpayer entered into a "Project Development and Management Agreement" (Hereinafter "Agreement") whereby taxpayer arranged for the construction of the casino and agreed to subsequently provide for the day-to-day operation of the casino once construction was complete. Taxpayer assisted in obtaining the casino license, but casino owner was the entity which actually held the casino's license.

Under the terms of the parties' Agreement, taxpayer had the responsibility to recruit and train the casino staff members, create and implement a casino marketing program, obtain the casino license on behalf of the owner, acquire the necessary start-up supplies and equipment, and develop start-up and operating budgets.

Under the terms of the Agreement, the casino owner designated taxpayer as the casino owner's "exclusive agent, to supervise, manage, direct and operate the [casino] during the Terms of this Agreement." Taxpayer was granted "all the prerogatives normally accorded to management in the ordinary course of commerce, including... the collection of receivables, the incurring of trade debts, the approval and payment of checks, the advance of credit and the negotiating and signing of operational leases and contracts." In addition, the Agreement stipulated that "Unless this Agreement expressly provides for an item or service to be at [taxpayer's] own expense, all costs and expenses incurred by [taxpayer]... in the performance of [taxpayer's] obligations under this Agreement shall be for and on behalf of [casino owner]." The Agreement specifically provides that, "All debts and liabilities incurred to third parties by [taxpayer] on behalf of either the [casino] Owner or the Project are and shall remain the sole obligation of [casino] Owner."

In terms of the people who worked at the casino, taxpayer was granted "sole authority to hire, promote, discharge, and supervise all personnel." With the exception of the casino manager, department managers, credit manager, chief financial officer, all the casino employees were designated as employees of the casino owner. All of the costs related to the casino owner's employees were designated as an "Operating Expense of the Project and reimbursed to [taxpayer] on a current basis."

After the Agreement was signed, casino owner began to pay taxpayer money in the form of "management fees" which taxpayer characterized as reimbursement for expenses representing the payments advanced by taxpayer to the casino owner's employees. The issue centers on the amount of money which taxpayer received from casino owner which was used to pay the casino employees. Taxpayer contends that this money is not subject to gross income tax because it was received while taxpayer was acting in an agency capacity. According to taxpayer, it was under the control of the casino owner, it did not have any right, title or interest in the money or property received from the transaction, but that the money passed through to third parties. In sum, taxpayer was merely the agent through which the funds passed to the third parties.

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana, the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2).

However, 45 IAC 1-1-54 exempts that portion of a taxpayer's income which the taxpayer receives while acting in an agency capacity. The regulation states:

Taxpayers are not subject to gross income tax on income they receive in an agency capacity. However, before a taxpayer may

deduct such income in computing his taxable gross receipts, he must meet two (2) requirements:

(1) The taxpayer must be a true agent. Agency is a relationship which results from the manifestation of consent by one person to another authorizing the other to act on his behalf and subject to his complete control, and consent by the other to so act. Agency may be established by oral or written contract, or may be implied from the conduct of the parties. However, the representation of one party that he is an agent of another without a manifestation of consent by the alleged principal is insufficient to establish an agency. Both parties must intend to act in such a relationship.

Characteristic of agency is the principal's right to complete and continuous control over the acts of the agent throughout the entire performance of the contract. This right to control cannot be limited to the accomplishment of a desired result. In addition, the principal must be liable for the authorized acts of the agent.

(2) The agent must have no right, title, or interest in the money or property received or transferred as an agent. In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third party; the agent is merely a conduit through which the funds pass. A contractual relationship whereby one person incurs expense under an agreement to be reimbursed by another is not an agency relationship unless the other elements of agency exist, particularly the element of control discussed above. Where tangible personal property is purchased by an agent for a principal, title need not vest immediately in the principal in order for the agent's reimbursement to be deductible if there is an agreement between the parties authorizing one to purchase on behalf of other. However, income derived from sales by the principal and subsequent resale by the agent to customer is subject to gross income tax.

In summary, when applying the above factors to a particular taxpayer, the critical factor is that of control. Notwithstanding the fact that the taxpayer acting for another has no right, title or interest in the money or property received, the taxpayer is not entitled to deduct that income from the taxpayer's gross receipts unless the taxpayer was acting as a true agent subject to the control of his principal.

The Indiana Tax Court in Policy Management Systems Corp. v. Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999) and Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) reviewed the relationship between the imposition of the state's gross income tax and agency principles, echoed the regulatory standards set out in 45 IAC 1-1-54, and found that an agency relationship required consent by the principal, acceptance and authority by the agent, and control of the agent by the principal. (*See also* 45 IAC 1.1-1-2; 45 IAC 1.1-6-10).

The taxpayer has the burden of establishing that the reimbursements received from the casino owner were not subject to the state's gross income tax. *See Western Adjustment and Inspection Co. v. Gross Income Tax Division*, 142 N.E.2d 630, 635 (Ind. 1957). When discussing tax exemptions, such as 45 IAC 1-1-54, the courts have held that the exemptions are strictly construed against the taxpayer and in favor of taxation. Monarch Steel Co. v. State Bd. Of Tax Comm'r, 699 N.E.2d 809, 811 (Ind. Tax Ct. 1998); Trinity Episcopal Church v. State Bd. Of Tax Comm'r, 694 N.E.2d 816, 818 (Ind. Tax. Ct. 1998).

Taxpayer is correct in pointing out that there are elements of an agent/principal relationship in the Agreement between itself and the casino owner. Taxpayer is also correct that this money was received from the casino owner to pay the salaries of employees who worked in the casino owner's own gambling facility and that the terms of that Agreement *required* the casino owner to reimburse taxpayer for those expenses.

However, neither the terms of the parties' Agreement nor the parties' business practices indicate that the taxpayer was acting as a "true agent" sufficient to warrant finding that the income was not subject to Indiana's gross income tax. In order for a putative agent to avoid the consequences of the gross income tax, the agent must have no control or authority over the receipts at issue because the receipts must pass unimpeded through to the principal. Any apparent control which the agent exercises over the receipts is illusory because, at all times, the agent is simply acting on behalf of the principal. The agent eludes imposition of the gross income tax because the receipts never belong to the agent and because the principal controls the agent's substantive business activities. *See* 45 IAC 1-1-54(1).

There are two elements which are missing here. First, casino owner does not exercise the degree of authority over taxpayer characteristic of an agent/principal business relationship; instead, taxpayer retains operational control over the means and manner in which the casino is operated. Taxpayer was given a substantial degree of independent authority in arranging for the construction of the casino, in determining how the casino would be operated, and establishing the casino's operating budget. Taxpayer was given complete authority over the hiring and firing of personnel. As set out in the parties' Agreement, "[Taxpayer] shall have the sole authority to hire, promote, discharge, and supervise all personnel." Taxpayer was expected to consult with the casino owner in hiring certain key personnel, but taxpayer was given "the sole right to determine whom to hire." Although the terms of the Agreement specify that most of the casino personnel were the casino owner's employees, insofar as the employees were concerned, they worked for taxpayer. Taxpayer hired the employees and fired these employees. Presumably, if one of these employees was late for work, it was taxpayer – and not the casino owner – which decided if that employee's next paycheck should be docked. Presumably if one of these employees exhibited a high standard of performance, it was up to taxpayer – not the casino owner – to determine whether the employee was entitled to a bonus or a promotion. Insofar as the relationship between these parties, taxpayer was more than simply a paymaster handing out paychecks to the casino owner's employees at the end of each month. In terms of the day-to-day operation of the casino, the casino employees worked for taxpayer and worked under the direct control of the taxpayer.

There are other aspects of this Agreement which demonstrate that casino owner did not have direct control over taxpayer. For

example in the matter of casino expenditures and budgets, the Agreement stipulated that taxpayer was “entitled to increase these budgets to cover any expenditures or contingencies that were unanticipated by [taxpayer] at the preparation of these budgets....” In addition, taxpayer was authorized to “reallocate all or any portion of any amount budgeted with respect to any one item in any of the budgets to another item budgeted therein.”

In the day-to-day operation of the casino’s gambling business, taxpayer was granted “the absolute discretion and authority to determine operating policies and procedures, standards of operation, credit policies, complimentary policies, win payment arrangements, standards of service and maintenance, food and beverage quality and service, pricing, and other standards affecting the [casino], or the operation thereof, to implement all such policies and procedures, and to perform any act on behalf of [casino owner] which [taxpayer] deems necessary or desirable for the operation and maintenance of the [casino]....”

The gambling casino belonged to casino owner, and casino owner retained ultimate authority to control the operation of that facility, but the taxpayer retained substantially independent autonomy to run that facility. Although the two parties had a specific and well-defined contractual relationship, this is not the sort of relationship envisaged in the regulation which states that the agent must be under the control of the principal. *See* 45 IAC 1-1-54(1). Despite the generalized intention of these two parties, taxpayer is not a “true agent” of the casino owner sufficient to establish that this money was not subject to gross income tax because the casino owner – as principal – did not retain control over the manner in which taxpayer operated the casino business. The parties’ Agreement establishes the relationship between taxpayer and the casino owner; it does not permit the casino owner to dictate the manner in which taxpayer fulfills its responsibilities under that Agreement.

In addition, a second element is missing. Taxpayer has not established that it was merely acting as a conduit for the money eventually paid over to the casino employees. 45 IAC 1-1-54(2) in part, requires that, “The agent must have no right, title, or interest in the money or property received or transferred as an agent. In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third part; the agent is merely a conduit through which the funds pass.” *Id.* In order to establish that it was acting as “merely a conduit,” taxpayer must establish that only the employees had a beneficial interest in the money. As the Tax Court stated in Universal Group Ltd. v. Indiana Dept. of Revenue, 609 N.E.2d 48 (Ind. Tax Ct. 1993), “[T]he taxpayer’s beneficial interest is income is central to the receipt of gross income.” *Id.* at 50. Taxpayer had a beneficial interest in seeing that the casino employees it hired, supervised, and directed were paid for the work the employees performed in operating the casino. Because taxpayer was charged with the responsibility for successfully operating the casino, it had a direct beneficial interest in the money it received from casino owner. Taxpayer was not simply a disinterested paymaster distributing paychecks on behalf of the casino owner. Its own interests were inextricably bound with those of the employees, the casino owner, and the money it received from casino owner.

In order to qualify for the agency status it seeks, taxpayer must demonstrate that the casino owner retained the right to dictate the manner in which taxpayer ran the casino and that taxpayer had no right to or control over the money received from the casino owner. “[B]efore a taxpayer may deduct such income in computing his taxable gross receipts, he must meet two (2) requirements.” 45 IAC 1-1-54. The taxpayer must be a “true agent” and “have no right, title or interest in the money or property received or transferred as an agent.” *Id.* It is plain that casino owner did not retain the right to control the manner in which taxpayer managed the casino business; furthermore, taxpayer holding company had a beneficial interest in the money received from the casino owner.

FINDING

Taxpayer’s protest is respectfully denied.

II. Abatement of the Ten-Percent Negligence Penalty.

Taxpayer asks that the Department abate the ten-percent negligence penalty.

IC 6-8.1-10-2.1 requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer’s negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as “the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.” Negligence is to “be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.” *Id.*

IC 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on “reasonable cause and not due to willful neglect.” Departmental regulation 45 IAC 15-11-2(c) requires that in order to establish “reasonable cause,” the taxpayer must demonstrate that it “exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed....”

Taxpayer has simply submitted a bare request that the negligence penalty be abated but has provided no substantive reason for the Department to consider doing so. The Department concludes that the taxpayer’s failure to report gross receipts received from operating a riverboat casino within Indiana does not constitute the “reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.” 45 IAC 15-11-2(b).

FINDING

Taxpayer’s protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320030442P.LOF

LETTER OF FINDINGS NUMBER: 03-0442P**Withholding Tax****For the Calendar Year 2000**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE**I. Tax Administration – Penalty**

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of annual W-2s and the WH-3.

The taxpayer is an in-state company.

I. Tax Administration – Penalty**DISCUSSION**

The taxpayer argues the late penalty should be abated as the W-2s and WH-3 were mailed before the due date.

The Department notes the postmark on the accompanying envelope was April 26, 2001, 57 days past the due date.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030460.LOF

LETTER OF FINDINGS NUMBER: 03-0460**Sales and Use Tax****For the Tax Period 2000-2002**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES**1. Sales and Use Tax- Manufacturing Exemptions**

Authority: IC 6-8.1-5-1 (b), IC 6-2.5-3-2 (a), IC 6-2.5-5-3(b), *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E. 2d 651 (Ind. 1948).

The taxpayer contends that certain items of tangible personal property qualify for a manufacturing exemption from the sales and use tax.

2. Tax Administration-Imposition of Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer is a corporation that manufactures component parts for the automotive industry. After an audit for the tax period 2000-2002, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty. During the review process, the department and the taxpayer came to agreement that the four tool stands purchased on January 16, 2000 and listed on page 23 of the audit assessment and the four and five inch swivel casters purchased on December 1 and December 14, 2000 and listed on page 21 of the audit assessment were exempt from sales and use tax. The taxpayer continued

in its protest of the assessment of use tax on several other items and the penalty. A hearing was held and this Letter of Findings results.

1. Sales and Use Tax-Manufacturing Exemptions

DISCUSSION

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Indiana imposes an excise tax, the use tax, on tangible personal property purchased in a retail transaction and stored, used, or consumed in Indiana. IC 6-2.5-3-2 (a). There are a number of exemptions from the use tax pursuant to the statute. All exemptions must be strictly construed against the party claiming the exemption. *Gross Income Tax Division v. National Bank and Trust Co.*, 79 N.E. 2d 651 (Ind. 1948).

The taxpayer protested the assessments of use tax assessed on replacement parts for a forklift, proximity lasers, small part racks, grating, tool balancers, lift tables, crates, and traceability systems. The taxpayer argued that the protested items qualify for exemption pursuant to the following provisions of IC 6-2.5-5-3 (b):

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

The arguments and documentation submitted by the taxpayer were insufficient to establish that the protested items were actually directly used in the direct production of the taxpayer's products. Therefore, the taxpayer did not sustain its burden of proving that the department's assessment was incorrect.

FINDING

The taxpayer's protest is denied.

2. Tax Administration-Imposition of Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

During the tax period, the taxpayer purchased without paying the sales or use tax on many clearly taxable items such catering services, office supplies, and tee shirts. These breaches of the taxpayer's duty constitute negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040263P.LOF

LETTER OF FINDINGS NUMBER: 04-0263P

Income Tax

For the Calendar Year 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on the non-filing of an amended Indiana income tax return for the calendar year 2000.

The taxpayer is an individual residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as the original tax was paid with the original return.

The taxpayer was audited by the IRS where a Revenue Agent Report was issued on October 1, 2003. The taxpayer did not file an amended Indiana income tax return to reflect the Federal assessment. The Department assessed the taxpayer on information received from the IRS.

Indiana Code 6-3-4-6(a) states a taxpayer must file an amended income tax return within 120 days when a federal modification is incurred.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties as the taxpayer did not file an amended income tax return within the 120 day period after the issuance of the Federal Revenue Agent Report. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0120040366.LOF

LETTER OF FINDINGS NUMBER: 04-0366 Adjusted Gross Income Tax For the Tax Period 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

1. Adjusted Gross Tax-Credit for Estimated Taxes Paid

Authority: IC 6-8-1-5-1(b), IC 6-3-2-1(a), IC 6-3-4-4.1 (c).

The taxpayer protests the assessment of adjusted gross income tax on certain receipts.

STATEMENT OF FACTS

The taxpayer and his former wife were divorced in January 2003. For tax year 2002, they filed their Indiana adjusted gross income tax returns individually. They had filed jointly in prior years. Estimated income tax payments for 2002 were made on joint vouchers. All vouchers were signed by the taxpayer. The total amount of estimated payments for 2002 plus the refund for tax year 2001 applied to 2002 equals \$2,080. When filing his 2002 Indiana adjusted gross income tax return, the taxpayer claimed all of the estimated payments as payments towards his tax liability. The taxpayer's ex-wife claimed \$712 of the 2002 estimated tax payments and 2001 refund as a credit against her taxes due. The Indiana Department of Revenue (department) adjusted the taxpayer's income tax liability to reflect the credit taken against the former wife's income tax liability. Subsequently the department assessed the additional income tax, penalty, and interest against the taxpayer. The taxpayer protested this assessment and a hearing was held. This Letter of Findings results.

1. Adjusted Gross Income Tax-Credit for Estimated Taxes Paid

DISCUSSION

All department assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

Indiana imposes the adjusted gross income tax on Indiana residents. IC 6-3-2-1(a).

The taxpayer paid estimated Indiana adjusted gross income taxes during 2002 pursuant to the following provisions of IC 6-3-4-4.1(c):

Every individual who has gross income subject to the tax imposed by this article and from which tax is not withheld under the requirements of section 8 of this chapter shall make a declaration of estimated tax for the taxable year.

Throughout their marriage, the taxpayer and his former wife individually paid the Indiana adjusted gross income taxes on their respective incomes. The taxpayer made estimated payments throughout the tax year 2002 based upon his retirement income. He made the estimated tax payments with checks on his personal account and use of the 2001 Indiana adjusted gross income tax refund. Since the refund was due to additional withholding from his former wife's salary, he reimbursed his ex-wife for the amount of the 2001 refund that was applied to his estimated tax payments for the tax year 2002. The taxpayer's ex-wife was employed during the tax period 2002 and Indiana taxes were withheld from her income.

The taxpayer was the party with income that was not subject to withholding. The taxpayer offered substantial evidence that he actually made all the 2002 estimated tax payments from his own funds. Therefore, the taxpayer should receive the credit for the subject estimated payments to apply to his 2002 Indiana adjusted gross income tax liability.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0120040405.LOF

LETTER OF FINDINGS NUMBER: 04-0405

Adjusted Gross Income Tax

For the Year 2001

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Adjusted Gross Income Tax-Disallowance of Exemptions

Authority: IC 6-8.1-5-1(b), IC 6-3-1-3.5(a)(3),(4), IC 6-3-1-3.5(a)(5)(A), 26 USCA 151(c)(1)(B), 26 USCA 151(d)(2), 45 IAC 3.1-1-5(b)(4).

The taxpayer protests the disallowance of certain exemptions.

II. Tax Administration-Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer is a married couple who filed a joint 1040 federal return reporting income received during 2001. The taxpayer (wife), whose ex husband lives in Texas, and her current husband have custody of the two children of the former marriage. Pursuant to the terms of the Decree of Divorce, the taxpayer(wife) and her ex husband each took the federal dependent exemption for one of children of the previous marriage. The taxpayer took the Indiana exemption for both children. The Indiana Department of Revenue, hereinafter referred to as the "department," disallowed the taxpayer's use of the Indiana dependent exemptions for the child claimed by the ex husband for federal purposes. The taxpayer protested the resulting assessment of additional tax, interest, and penalty. A telephone hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax-Disallowance of Exemptions

DISCUSSION

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

The taxpayer argues that she was legitimately entitled to claim both the exemptions on her state return even though she was only entitled to claim one dependent exemption on her federal return pursuant to the Decree of Divorce of the parents of the children.

Insofar as relevant to the taxpayer's "Line 8" deductions, IC 6-3-1-3.5(a)(3),(4) states that the Indiana taxpayer is to "Subtract one thousand dollars (\$1,000.), or in the case of a joint return filed by a husband and wife, subtract for each spouse one thousand dollars (\$1,000). Subtract one thousand dollars (\$1,000) for each of the exemptions provided by Section 151 (c) of the Internal Revenue Code." Insofar as relevant to the taxpayer's "Line (9)" deductions, IC 6-3-1-3.5(a)(5)(A) permits an Indiana taxpayer to "subtract one thousand five hundred dollars (\$1,500) for each of the exemptions allowed under Section 151(c)(1)(B) of the Internal Revenue Code for taxable years beginning after December 31, 1996."

The statutory formula is straightforward; an Indiana taxpayer may claim a \$1,000 exemption on line 8 of his Indiana return if that the exemption is allowed under Section 151(c). The Indiana taxpayer may claim a \$1,500 deduction on line 9 of his Indiana return if that exemption is allowed under Section 151(c)(1)(B).

The issue to be determined in this case is whether or not the taxpayer could take the federal exemption for both children. If the taxpayer could take the federal dependent exemption for each child, then the taxpayer could take the Indiana dependent exemptions for each child.

Section 151 (c) provides that a non-custodial parent may take the federal exemption for a child if it is so ordered by a Court. In this case, the Decree of Divorce indicates that the District Court of Harris County, Texas ordered that the federal dependent exemptions be divided equally between the mother and father. The father is allowed to take one federal dependent exemption and the mother is allowed to take one federal dependent exemption. The federal statute only provides one federal dependent exemption to the taxpayer.

The statute is clarified by 45 IAC 3.1-1-5(b)(4) which directs the taxpayer to "[s]ubtract \$1000 for each exemption taken on

the Federal return for taxpayer or spouse aged 65 or above...” and to subtract “\$500 [now \$1,500] *for each exemption taken on the Federal return for a qualified dependent.*” (Emphasis added.) The regulation requires that an exemption be taken on the federal return for a “qualified dependent.” Pursuant to the Decree of Divorce, the taxpayer only had one qualified dependent for federal purposes.

The law and regulation are explained in the Indiana adjusted gross income tax information booklet that states, “You are allowed a \$1,000 exemption on your Indiana tax return for each *exemption you claim on your federal return.*” (Emphasis added.) Relevant to line nine, the booklet states that, “An additional exemption, which has been increased to \$1,500, is allowed for certain dependent children.” In this case the taxpayer only had one dependent child which she was allowed to claim on her federal adjusted gross income tax return.

The law, the instructions printed on the Indiana tax form, the accompanying instructional booklet, and the Department’s regulation preclude an Indiana taxpayer from claiming an exemption unless the taxpayer is also allowed to claim the exemption on the federal adjusted gross income return. The taxpayer could only take one dependent exemption on her federal adjusted gross income tax return. Consequently, she could only take one dependent exemption on her Indiana adjusted gross income tax return.

FINDING

The taxpayer’s protest is denied.

II. Tax Administration-Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

This taxpayer claimed the same two dependent exemptions on her 1999 Indiana adjusted gross income tax return. After discovery of this mistake, the department assessed this taxpayer for the additional taxes, interest, and penalty for 1999. The taxpayer protested the assessment and a hearing was held. The department held against the taxpayer. This decision clearly instructed the taxpayer on the proper use of the dependent exemption. The taxpayer failed to follow these instructions and continued to improperly take an additional dependent exemption. This breach of the taxpayer’s duty constitutes negligence.

FINDING

The taxpayer’s protest is denied.

DEPARTMENT OF STATE REVENUE

0320050006.LOF

LETTER OF FINDINGS: 05-0006

Withholding Tax

For 2003

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department’s official position concerning a specific issue.

ISSUES

I. Withholding Tax.

Authority: IC 6-3-4-8(a); 26 U.S.C.S. § 3401(a); 26 U.S.C.S. § 3401(c); 26 U.S.C.S. § 3402(a); Treas. Reg. § 31.3401(c)-1(c); Treas. Reg. § 31.3401(d); 2005 U.S. Master Tax Guide (CCH 2005).

Taxpayer maintains that he is not required to withhold income tax from wages paid to his employees.

II. Involuntary Servitude.

Authority: U.S. Const. amend. XIII, § 1; Porth v. Brodrick, 214 F.2d 925 (10th Cir. 1954); Abney v. Campbell, 206 F.2d 836 (5th Cir. 1953).

Taxpayer argues that requiring him to withhold tax from his employees is a form of involuntary servitude forbidden by the Thirteenth Amendment to the Constitution.

STATEMENT OF FACTS

Taxpayer is an Indiana resident who has people working for him. The Department of Revenue (Department) found that taxpayer had failed to withhold state income tax from the money taxpayer paid to his employees. Therefore, the Department sent taxpayer

a “Delinquency Notice.” The “Delinquency Notice” stated that taxpayer failed to pay required withholding taxes. Taxpayer disagreed with the Department’s decision and submitted a protest letter to that effect.

Upon assignment to the Hearing Officer, taxpayer was notified of his opportunity to take part in an administrative hearing and to further explain the basis for his protest. Taxpayer chose not to respond. Taxpayer was notified a second time and was provided a second opportunity to schedule the hearing. Taxpayer again chose not to respond. Consequently, this Letter of Findings was written based entirely upon taxpayer’s written protest letter.

DISCUSSION

I. Withholding Tax.

Taxpayer maintains that he is not required to withhold taxes from wages paid to his employees. Taxpayer states that a “[W]-4 form is needed to legally allow for any withholding. [W]ithout a properly signed [W]-4 it is a criminal act to withhold a citizens funds if they live and work the 50 states.” Taxpayer claims that the Department is asking him “to commit theft.” In support of his position, taxpayer has attached Issue Number 233 of the “Membership Newsletter of the Save-A-Patriot Fellowship.”

Insofar as an employer’s obligation to withhold taxes, IC 6-3-4-8(a) states in part:

Except as provided in subsection (d) or (l), every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department.

Each Indiana employer becomes liable for any amount of taxes withheld. IC 6-3-4-8(a) states in part that each “employer making payments of any wages... shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section....”

Pursuant to IC 6-3-4-8(a), if an employer is required by the Internal Revenue Code to withhold federal taxes, that employer must do the same for state income tax purposes.

26 U.S.C.S. § 3402(a) states that, “In general. Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary.” “Withholding income tax by an employer is required on each of an employee’s wage payments.” 2005 U.S. Master Tax Guide para. 2601, p. 690 (CCH 2005). 26 U.S.C.S. § 3401(a) states that, “For purposes of this chapter [26 USCS §§ 3401 et seq.], the term “wages” means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer....” The term “employer” includes not only individuals and organizations engaged in a trade or business, but also organizations exempt from income, social security, and unemployment taxes. Treas. Reg. § 31.3401(d). Withholding also applies to wages and salaries of employees, corporate officers, or elected officials of federal, state, and local governmental entities. 26 U.S.C.S. § 3401(c).

Taxpayer points to 26 U.S.C.S. § 3402(p) in support of his contention that the withholding of taxes is voluntary. Taxpayer is correct to the extent that certain specified payments are subject to voluntary withholding. However, the withholding of taxes from ordinary wages is not “voluntary.” “Taxpayers may request voluntary withholding from certain federal payments other than wages. Payments subject to voluntary withholding include social security benefits, crop disaster payments, Commodity Credit Corporation loans, and any other payments to be specified in regulations by the IRS.” 2005 U.S. Master Tax Guide para. 2601, p. 694 (CCH 2005). *See* Treas. Reg. § 31.3401(c)-1(c). Therefore, if an individual employee is receiving one of these designated payments in addition to his regular salary, the employee may voluntarily request that his employer withhold an additional amount from his regular paycheck.

The Internal Revenue Code requires that every employer withhold federal taxes from employees’ wages. The Indiana Code requires that every employer subject to the federal withholding law simultaneously withhold state income taxes. Neither the federal nor state withholding requirement is “voluntary.”

FINDING

Taxpayer’s protest is denied.

II. Involuntary Servitude.

Taxpayer asserts his “rights not to be an unpaid tax collector which the [T]hirteenth [A]mendment guarantees protection from involuntary servitude.”

U.S. Const. amend. XIII, § 1 states that “Neither slavery nor involuntary servitude except as a punishment from crime whereof the party shall have been convicted shall exist within the United States, or any place subject to their jurisdiction.”

There is nothing which supports taxpayer’s contention that requiring taxpayer to withhold state income taxes equate to “slavery” or “involuntary servitude.” As explained by the Court of Appeals for the Tenth Circuit, “If the requirements of the tax laws were to be classed as servitude, they would not be the kind of involuntary servitude referred to in the Thirteenth Amendment.” Porth v. Brodrick, 214 F.2d 925, 926 (10th Cir. 1954). The court further held that the petitioner’s claim to the contrary was, “unsubstantial and without merit” as well as “far-fetched and frivolous.” *Id.*

The Department is unable to agree with taxpayer’s claim that requiring him to comply with the withholding requirement equates to a form of servitude. The enforcement of the withholding requirement is not the imposition of servitude. It is the collection of a tax and the enforcement of an obligation which, under well-settled law, the taxpayer may be lawfully subjected to. The enforcement

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of the law imposing state income tax is not a violation of the Thirteenth Amendment. *See* Abney v. Campbell, 206 F.2d 836, 841 (5th Cir. 1953).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050023.LOF

LETTER OF FINDINGS NUMBER 05-0023
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Period 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUE

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

STATEMENT OF FACTS

The taxpayer was the incorporator and an officer of two related corporations that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 2002. After the taxpayer was personally assessed for the taxes, penalties and interest, she filed a protest. The taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The corporations were engaged in the provision of financial and business services. The subject tax liability concerns sales and withholding taxes collected but not remitted by a restaurant. The taxpayer contends that she was not involved in the restaurant business. The tax identification number of the restaurant was the same as one of the corporations that the taxpayer incorporated. She did not provide any evidence that the restaurant was not connected to her corporations.

The taxpayer was the sole incorporator of both corporations. She was an officer and admitted that she performed bookkeeping services including filing tax returns. She contends that she left the businesses prior to the tax period. She did not produce adequate documentation that she was not involved with the corporations during the tax period.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120050026.LOF

LETTER OF FINDINGS: 05-0026
Individual Adjusted Gross Income Tax
For 1999 and 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sufficiency of Information Used to Determine State Income Tax Assessments.

Authority: IC 6-8.1-5-1(a); IC 6-8.1-5-1(b).

Taxpayer maintains that the assessment of state income taxes is based upon unverified information obtained from the Internal Revenue Service.

II. Absence of OMB Numbers.

Authority: 44 U.S.C.S. § 3502(11); 44 U.S.C.S. § 3507(f); 44 U.S.C.S. § 3512; 44 U.S.C.S. §§ 3501-3520; *United States v. Holden*, 963 F.2d 1114 (8th Cir. 1992).

Taxpayer states that because the directions for federal income tax forms lack an OMB number, the federal income tax assessments – along with the consequent state tax assessments – are invalid.

III. Tax Records.

Authority: I.R.C. § 6001; I.R.C. § 6011(a); Treas. Reg. § 1.6001-1(a).

Taxpayer argues that because the Secretary of the Treasury never notified him that he was required to maintain federal tax records, the federal tax assessments – along with state tax assessments for the same years – are invalid.

IV. Liability for State Income Taxes.

Authority: *Schiff v. United States*, 919 F.2d 830 (2nd Cir. 1990); 28 Ind. Reg. 1958.

Taxpayer claims that nothing in either state or federal law renders him “liable” for federal or state income taxes.

STATEMENT OF FACTS

Taxpayer is an Indiana resident. The Department of Revenue (Department) received information from the Internal Revenue Service indicating that taxpayer had obtained unreported income. The IRS information was used in calculating taxpayer's state income tax liability. The Department then sent taxpayer notices of “Proposed Assessment.” Taxpayer objected to the assessments and sent the Department a series of letters in which he requested additional information. The Department responded by forwarding what it regarded as the appropriate information. Taxpayer determined that the Department's response was inadequate and continued his initial objections. The matter was treated as a protest, was assigned to a Hearing Officer, and an administrative hearing was conducted. Taxpayer restated his objections during the hearing, and this Letter of Findings results.

DISCUSSION

I. Sufficiency of Information Used to Determine State Income Tax Assessments.

Taxpayer argues that the information upon which the Department relied was insufficient and unverified.

The Department based the proposed assessments upon information obtained from the IRS. The IRS shared the information with the Department after the IRS concluded that taxpayer failed to file federal returns for 1999 and 2000 but had nonetheless received taxable income during those years. The information provided by the IRS was gathered after it conducted an audit on February 13, 2004.

Indiana law provides as follows: “If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall* make a proposed assessment of the amount of the unpaid tax due on the basis of the best information available to the department.” IC 6-8.1-5-1(a) (*Emphasis added*).

In taxpayer's case, the Department believed that the “best information available” consisted of the information obtained from the IRS after the IRS audited taxpayer. After obtaining that information, the Department fulfilled its legal responsibility to make a “proposed assessment.”

Nonetheless, taxpayer claims that the information obtained from the IRS is both unverified and unreliable. Specifically, taxpayer claims that both Indiana's proposed assessment and the original IRS information are unsigned and lack supporting documentation.

However, it is not the Department's responsibility to bolster the credibility or accuracy of the information obtained from the IRS. The Department found that the IRS information was the “best information available” at the time the proposed state income tax assessments were issued. There is nothing on the face of the IRS information which would raise a question as to either the legitimacy or accuracy of that information. Having received that information, the Department was bound by statute to issue the proposed assessments for 1999 and 2000 state taxes.

Taxpayer has provided the Department nothing which would cause the Department to question the IRS information. Taxpayer's generalized objections, that the information is unreliable and unverified, do nothing which strike to the heart of the matter. Were the proposed assessments correct? Did the IRS err in calculating taxpayer's adjusted gross income? Did the Department overlook a deduction or exemption to which taxpayer was entitled? Did someone in the IRS or the Department make a clerical error? Taxpayer has not raised these or any similar objections.

Indiana law provides that, “The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is wrong.” IC 6-8.1-5-1(b). Metaphorically speaking, once a proposed assessment is made, the ball is in the taxpayer's court; it is up to the taxpayer to provide something to challenge the proposed assessment. In this case, taxpayer has done nothing which would lead the Department to believe that the proposed assessments of state income tax were somehow erroneous.

FINDING

Taxpayer's protest is denied.

II. Absence of OMB Numbers.

Taxpayer claims that the proposed state income tax assessments are invalid because directions for the federal tax forms – upon which state assessments were based – did not contain OMB numbers.

Taxpayer's argument is apparently based on the fact that the regulations and directions accompanying the federal tax forms do not have an OMB number.

Under the Paperwork Reduction Act of 1980 (1980 Act), 44 U.S.C.S. §§ 3501-3520, any information collection request from a federal agency must display a control number issued by the Director of the Office of Management and Budget (OMB). 44 U.S.C.S. § 3507(f). If an agency's information collection request does not display the OMB control number assigned by the Director, no person can be penalized for failing to provide the requested information. 44 U.S.C.S. § 3512. The 1980 Act defines an information collection request as a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information. 44 U.S.C.S. § 3502(11). Although tax forms fall within the Act's definition of information collection requests, tax instruction booklets do not. Because tax instruction booklets simply assist a taxpayer in completing tax forms and ensure compliance with the information collection requests, booklets are not required to display an OMB number. As long as the 1040 form complies with the Act, nothing more is required. *See United States v. Holden*, 963 F.2d 1114 (8th Cir. 1992).

Taxpayer's challenge to the proposed assessments of state income tax – based on the fact that the federal printed instructions lack an OMB number – is not well founded.

FINDING

Taxpayer's protest is denied.

III. Tax Records.

According to taxpayer, I.R.C. §§ 6001, 6011 require that the United States Secretary of Treasury personally notify taxpayer of the taxpayer's obligation to maintain tax records. Taxpayer concludes that because the Secretary of Treasury did not notify taxpayer he was required to keep those records, the federal assessment – and the related state tax assessments – are invalid.

I.R.C. § 6001 states in part as follows:

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person *or by regulations*, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title. (*Emphasis added*).

I.R.C. § 6011(a) states, as a general rule, as follows:

When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Taxpayer reads I.R.C. §§ 6001, 6011 as requiring that the Secretary of the Treasury notify taxpayer of any obligation to maintain financial records. Although the Secretary may not have personally notified taxpayer of taxpayer's obligation to maintain adequate records, the IRS – acting under authority promulgated by the Department of the Treasury – has issued a regulation requiring all taxpayers to keep accurate, permanent books and records in order to be able to determine the various types of income, gains, losses, costs, and any other amounts that affect taxpayers' income tax liability for each year. Treas. Reg. § 1.6001-1(a).

FINDING

Taxpayer's protest is denied.

IV. Liability for State Income Taxes.

Taxpayer maintains that nothing in either federal or state law makes him "liable" for federal or state income taxes. Taxpayer's semantic argument has been previously addressed by the Department in Letter of Findings 01-20040265 issued December 23, 2004 (28 Ind. Reg. 1958). *See also Schiff v. United States*, 919 F.2d 830, 834 (2nd Cir. 1990). This argument is without substance and will not be readdressed here.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120050052P.LOF

LETTER OF FINDINGS NUMBER: 05-0052P**Income Tax****For the Calendar Year 2003**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the late penalty, and the underpayment penalty for estimated tax.

STATEMENT OF FACTS

The late penalty and estimated tax underpayment penalty were assessed on the filing of a calendar year individual income tax return for the year 2003.

The taxpayer is an individual residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as the taxpayer did not have the K-1 information available to pay the tax by the due date. Also, the taxpayer says the penalty is excessive in that it is 42.4%.

With regard to the excessive penalty of 42.4%. The Department points out the taxpayer is mistaken. The unpaid tax balance is assessed 10% penalty and the tax balance only accrues simple interest at the rate of 4% per year.

With regard to the lack of information, the Department has in place a system where the taxpayer can pay an estimate at the due date and then request a refund at the actual filing of the return. It is a system that is in common use for taxpayers who do not have the information available to file an income tax return at the due date.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420050087.LOF

LETTER OF FINDINGS NUMBER 05-0087

RESPONSIBLE OFFICER

SALES TAX and WITHHOLDING TAX

For Tax Period 1987-1991

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUE

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

STATEMENT OF FACTS

The taxpayer was an officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1987-1991. After the taxpayer was personally assessed for the taxes, penalties and interest, he filed a protest. A hearing was scheduled for April 28, 2005. The taxpayer did not appear for the hearing. Therefore, this Letter of Findings is based upon the documentation in the file.

Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:

An individual who:

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- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
(2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer admitted that he was the party responsible for the remittance of sales and withholding taxes to the state. He protested the amount of the tax liability as assessed by the Indiana Department of Revenue. He failed, however, to provide any documentation to demonstrate that the assessments were incorrect. Therefore, he did not sustain his burden of proof.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320050128.LOF

LETTER OF FINDINGS NUMBER 05-0128

RESPONSIBLE OFFICER

WITHHOLDING TAX

For Tax Period 1995-2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUE

Withholding Tax -Responsible Officer Liability

Authority: IC 6-3-4-8 (f), IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate withholding taxes.

STATEMENT OF FACTS

The taxpayer was an incorporator and officer of a corporation that did not remit the proper amount of withholding taxes to Indiana for the tax period 1995-2002. After the taxpayer was personally assessed for the taxes, penalties and interest, he filed a protest. The taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

Withholding Tax-Responsible Officer Liability

DISCUSSION

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer argued that he sold his interest in the corporation to another person in December, 1993 and was not in the position of a person responsible for the remittance of withholding taxes to the state of Indiana after that time. The taxpayer offered substantial documentation of the sale confirming his contention. The taxpayer sustained his burden of proving that he was not a person with the duty to remit withholding taxes to the state after December, 1993.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220050141P.LOF

LETTER OF FINDINGS NUMBER: 05-0141P

Income Tax

For the Calendar Year 1999

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of

publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the underpayment penalty.

STATEMENT OF FACTS

The underpayment penalty was assessed on the filing of a calendar year income tax return for the year 1999.

The taxpayer is an out-of-state company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the underpayment penalty should be abated as the taxpayer exerted reasonable care, and, the error was the result of an internal computer error.

The Department has consistently held in prior rulings the taxpayer is responsible for the proper operation of the taxpayer's computer equipment. As such, the taxpayer is liable for any errors resulting from the malfunction of the computer equipment.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

Revenue Ruling #2005-06ST

June 1, 2005

Notice: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Sales and Use Tax—Rental of Mobile PET Imaging Equipment

Authority: IC 6-2.5-4-10(a); IC 6-2.5-1-21; 45 IAC 2.2-4-27(d) (3)(c).

STATEMENT OF FACTS

The taxpayer provides diagnostic imaging and imaging-guided therapy services. The taxpayer operates and manages freestanding imaging centers and provides positron emission tomography (PET) equipment to various medical providers. The taxpayer requested this sales tax ruling pertaining to a Mobile PET Scanner Lease and Operating Agreement between the taxpayer and a hospital.

DISCUSSION

IC 6-2.5-4-10(a) states that a person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease. IC 6-2.5-1-21 defines a lease or rental as any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. 45 IAC 2.2-4-27(d) (3)(c) states that when tangible personal property is rented or leased along with the service of an operator, sales tax is imposed on the property rental. The tax is not imposed upon the charges for the operator's services, provided that such charges are separately stated on the invoice rendered by the lessor to the lessee.

In the agreement between the taxpayer and the hospital, the taxpayer is stated as engaged in the business of leasing PET equipment and performing certain operational activities in connection with the equipment. The agreement specifies that access to the mobile PET scanner is limited to the taxpayer's personnel, the hospital's personnel, designated physicians, and patients. The taxpayer is responsible for the operation of the mobile PET scanner—subject to the overall supervision of the hospital or the hospital's designated physician. All PET scans are to be performed under the direction and supervision of the hospital's designated physician. The taxpayer is restricted by the agreement from interpreting PET scans, labeling films, rendering medical advice, or

performing any medical diagnosis or treatment, or from preparing any report related to a patient receiving a PET scan on the mobile scanner equipment.

As described and defined in the agreement between the taxpayer and the hospital, the taxpayer is providing equipment and an operator. However, the hospital has received control of the equipment. The rental is taxable.

RULING

The Department rules that sales tax is to be charged and collected on the charges for the rental of the mobile PET Scanner.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection

Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE

Indiana Department of State Revenue

Revenue Ruling #2005-07ST

June 6, 2005

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

Sales and Use Tax—Purchase of tools and raw materials directly used in the direct fabrication of materials

Authority: IC 6-2.5-5-3; IC 6-2.5-5-6; 45 IAC 2.2-5-10(a).

Sales and Use Tax—Purchase of wiring and other related items that enable production equipment to operate

Authority: 45 IAC 2.2-5-8(g)(5).

STATEMENT OF FACTS

The taxpayer is a construction company. It is considering the formation of a separate legal entity that will assume fabrication operations for the construction company. In most instances, the construction company will retain title to the materials that will become part of the final output. The fabrication operations will charge the construction company a fee for the services.

The taxpayer seeks a ruling on whether the purchase of tools and raw materials directly used in direct fabrication of components sold to the construction company are exempt from sales tax under the production exemption, IC 6-2.5-5-3.

The fabrication operations also is considering the construction of a fabrication shop. Part of the project will involve electrical and other work that will make it possible for production equipment to operate.

The taxpayer seeks a ruling on whether the purchase of wiring and other related items that enable production equipment to operate qualify for the production exemption to sales tax.

DISCUSSION

Taxpayer has stated that the fabrication process used by Fabrication Operations will consist of two parts. The first part consists of the purchase of raw materials and the use of tools to fabricate metal posts and plates. IC 6-2.5-5-3 states that the purchase of tools and equipment acquired for direct use in the fabrication of other tangible property is exempt from sales tax. Therefore, any tools purchased by Fabrication Operations that will be directly used in fabrication will be exempt from sales tax. As for the raw materials, they are exempt under IC 6-2.5-5-6, which states that the purchase of tangible personal property is exempt if it is acquired for incorporation into other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business.

Fabrication Operations states it will use its own tools on Construction Company's raw materials to process metal parts. This falls under 45 IAC 2.2-5-10(a) which interprets IC 6-2.5-5-3. The application of the regulation means that if Fabrication Operations acquires tangible personal property belonging to Construction Company, processes that property, and then transfers it back to Construction Company for resale—then Fabrication Operations is an industrial processor. As an industrial processor, Fabrication Operations is exempt from sales tax. Tools purchased by Fabrication Operations used in fabrication will be exempt from sales tax.

Concerning the purchase by Fabrication Operations of wiring and other related items that enable production equipment to operate, the example in 45 IAC 2.2-5-8(g)(5) states:

A metal manufacturer uses a variety of electrically-powered production equipment which has differing voltage and

power requirements. Power cables used to bring electricity to the manufacturer's plant are taxable. Switch gears, transformers, conduits, cables, controls, rectifiers, and generators which are interconnected with the production equipment and serve as an electrical distribution system for such equipment are exempt from tax. Items used to distribute electricity for general lighting and space heating are taxable.

Since the taxpayer has not stated specifically what wiring and parts are to be employed and where they are to be employed, and because exemption scenarios are fact sensitive, the example from 45 IAC 2.2-5-8(g)(5) serves as a guide to the taxpayer.

RULING

The Department rules that tools purchased by Fabrication Operations that are directly used in fabrication will be exempt from sales tax. Purchases of raw materials are exempt from sales tax when acquired for incorporation into other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale. Wiring and parts are exempt when connected to production equipment that is directly used in direct production and serve as part of an electrical distribution system for such equipment. Wiring and parts are taxable sales when they are not directly connected to production equipment.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection

Indiana Department of State Revenue
